UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1993/8
2 July 1993

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-fifth session
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms

Final report submitted by Mr. Theo van Boven, Special Rapporteur

CONTENTS

	Paragraphs	Page
Prologue		3
Introduction	1 - 5	4
I. PURPOSE AND SCOPE OF THE STUDY; SPECIAL ISSUES OF INTEREST AND ATTENTION	6 - 25	6
II. RELEVANT EXISTING INTERNATIONAL NORMS	26 - 39	13
A. International human rights norms (global and regional human rights instruments)	26 - 32	13
B. Norms in the area of crime prevention and criminal justice	33 - 34	14
C. International humanitarian law norms	35 - 39	14

GE.93-14158 (E)

CONTENTS (continued)

		Paragraphs	Page
III.	STATE RESPONSIBILITY	40 - 49	16
IV.	RELEVANT DECISIONS AND VIEWS OF INTERNATIONAL HUMAN RIGHTS ORGANS	50 - 92	21
	A. The Human Rights Committee	50 - 59	21
	B. The Committee on the Elimination of Racial Discrimination	60	28
	C. The Committee against Torture	61 - 63	28
	D. The Committee on the Elimination of Discrimination against Women	64 - 66	29
	E. The Commission of Inquiry established under the Constitution of the International Labour Organisation	67 - 79	30
	F. The European Court of Human Rights	80 - 86	34
	G. The Inter-American Court of Human Rights	87 - 92	36
V.	COMPENSATION TO VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS RESULTING FROM THE UNLAWFUL INVASION AND OCCUPATION OF KUWAIT BY IRAQ	93 - 105	39
	A. The legal basis for Iraq's duty to pay compensation	95 - 97	39
	B. Loss, damage or injury suffered in connection with gross violations of human rights	98 - 102	40
	C. Governments and individuals as subjects submitting claims	103 - 104	42
	D. Some comments	105	43
VI.	NATIONAL LAW AND PRACTICE	106 - 125	44
VII.	THE ISSUE OF IMPUNITY IN RELATION TO THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS	126 - 130	51
VIII.	FINAL REMARKS; CONCLUSIONS AND RECOMMENDATIONS	131 - 136	53
IX.	PROPOSED BASIC PRINCIPLES AND GUIDELINES	137	56

Prologue

"The groans and cries to be heard in these pages are never uttered by the most wretched victims. These, throughout the ages, have been mute. Wherever human rights are completely trampled underfoot, silence and immobility prevail, leaving no trace in history; for history records only the words and deeds of those who are capable, to however slight degree, of ruling their own lives, or at least trying to do so. There have been - there still are - multitudes of men, women and children who, as a result of poverty, terror or lies, have been made to forget their inherent dignity, or to give up the efforts to secure recognition of that dignity by others. They are silent. The lot of the victim who complains and is heard is already a better one."

René Maheu, in: Preface to Birthright of Man, an anthology of texts on human rights prepared under the direction of Jeanne Hersch (UNESCO, 1968)

Introduction

1. The Sub-Commission on Prevention of Discrimination and Protection of Minorities, at its forty-first session, by its resolution 1989/13, entrusted Mr. Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, taking into account relevant existing international human rights norms on compensation and relevant decisions and views of international human rights organs, with a view to exploring the possibility of developing some basic principles and guidelines in this respect. At the forty-second session of the Sub-Commission, the Special Rapporteur presented a preliminary report (E/CN.4/Sub.2/1990/10). He submitted a first progress report (E/CN.4/Sub.2/1991/7) to the forty-third session of the Sub-Commission and a second progress report (E/CN.4/Sub.2/1992/8) to the forty-fourth session of the Sub-Commission.

2. The Sub-Commission, at its forty-fourth session, by its resolution 1992/32, requested Mr. van Boven to continue his study, taking into account, inter alia, the comments made in the discussion on the preliminary and progress reports, and to submit to the Sub-Commission, at its forty-fifth session, a final report which should include a set of conclusions and recommendations aimed at developing basic principles and guidelines with respect to the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.

3. This final report, which is partly based on the previous reports, consists of the following sections. The first section outlines the purpose and scope of the study and deals with special issues of interest and attention. The second section covers the relevant existing international norms in the areas of human rights, crime prevention and criminal justice and international humanitarian law. The third section deals with the issue of State responsibility. The fourth section reviews decisions and views of international human rights organs functioning in the framework of the United Nations and of the International Labour Organisation and at the level of regional human rights protection systems. The fifth section deals with the issue of compensation to victims of gross violations of human rights and fundamental freedoms resulting from the unlawful invasion and occupation of Kuwait by Iraq. The sixth section presents information and some analysis of national law and practice with respect to a number of countries. In the seventh section views are expressed on the issue of impunity in relation to reparations for victims of gross violations of human rights. The eighth section contains final remarks and presents conclusions and recommendations. The ninth section proposes basic principles and guidelines.

4. The Special Rapporteur expresses the hope that the basic principles and guidelines, included in section IX, may serve a useful purpose with a view to the adoption by the United Nations, during the current Decade of International Law, of a set of standards that strengthen the right to reparation for victims of gross violations of human rights.

5. The Special Rapporteur drew considerable benefit from the Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, held from 11 to 15 March 1992 at the University of Limburg, Maastricht, the Netherlands. The proceedings of this seminar were published in a special issue of the Netherlands Quarterly of Human Rights (SIM Special No. 12, 1992) and will be referred to in this study as Report of the Maastricht Seminar. The Maastricht Seminar proved to be most helpful to the Special Rapporteur, particularly in view of his efforts to present in the final section of this study a series of basic principles and guidelines.

I. PURPOSE AND SCOPE OF THE STUDY; SPECIAL ISSUES OF INTEREST AND ATTENTION

Purpose

6. Pursuant to the mandate for this study, the Special Rapporteur was requested to explore the possibility of developing basic principles and guidelines with respect to the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (Sub-Commission resolution 1989/13). This purpose has been constantly in the mind of the Special Rapporteur and in this final report he is now in a position to offer a set of basic principles and guidelines which, it is hoped, may commend themselves to the United Nations and all other interested parties.

7. When preparing this study the Special Rapporteur was in a number of cases approached by organizations and persons who assumed that the Special Rapporteur was also entrusted with the task of dealing with specific claims for compensation. This assumption was based on a misunderstanding about the nature and the purpose of the Special Rapporteur's mandate. He believes, however, that the general thrust of this study, its conclusions and recommendations and the set of basic principles and guidelines may be of help to all those who are seeking reparation for injury suffered as a result of gross violations of human rights and fundamental freedoms.

Gross violations

8. One of the determining factors for the scope of the study is that the mandate makes explicit reference to "gross violations of human rights and fundamental freedoms". While under a number of international instruments any violation of provisions of these instruments may entail a right to an appropriate remedy, the present study focuses on gross violations of human rights as distinct from other violations. No agreed definition exists of the term "gross violations of human rights". It appears that the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the word "gross" is also related to the type of human right that is being violated. 1/

9. In this respect useful guidance may be found in the work of the International Law Commission regarding the draft Code of Crimes Against the Peace and Security of Mankind. Relevant among the draft articles provisionally adopted by the Commission on first reading are for present purposes those articles which pertain to genocide (art. 19), apartheid (art. 20) and systematic or mass violations of human rights (art. 21). 2/ In the latter category are listed by the International Law Commission: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labour; persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; deportation or forcible transfer of population.

10. Guidance may also be drawn from common article 3 of the Geneva Conventions of 12 August 1949, containing minimum humanitarian standards which have to be respected "at any time and in any place whatsoever" and which

categorically prohibits the following acts: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 3/

11. While the above-cited categories of gross violations of human rights were taken from an existing or emerging body of international criminal law and from the law of basic humanitarian standards applicable in international and non-international armed conflicts, similar categories were drawn up from the perspective of State responsibility for violations of human rights based on customary international law. Thus, according to the Third Restatement of the Foreign Relations Law of the United States (Section 702), "A State violates international law if, as a matter of State policy, it practices, encourages or condones: (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) a consistent pattern of gross violations of internationally recognized human rights".

12. It should be noted that virtually all examples of gross violations of human rights cited in the previous paragraphs and taken from different sources are equally covered by human rights treaties and give rise also on that basis to State responsibility on the part of the offending State party and to the obligation to provide reparations to the victims of those gross violations. Given also the indivisibility and interdependence of all human rights, gross and systematic violations of the type of human rights cited above frequently affect other human rights as well, including economic, social and cultural rights. Equally, systematic practices and policies of religious intolerance and discrimination may give rise to just entitlements to reparation on the part of the victims.

13. The scope of the present study would be unduly circumscribed if the notion of "gross violations of human rights and fundamental freedoms" would be understood in a fixed and exhaustive sense. Preference is given to an indicative or illustrative formula without, however, stretching the scope of the study so far that no generally applicable conclusions in terms of rights and responsibilities could be drawn from it. Therefore it is submitted that, while under international law the violation of any human right gives rise to a right to reparation* for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment;

---

* The word "reparation" in this study denotes all types of redress, material and non-material, for victims of human rights violations. Consequently, the terms "restitution", "compensation" and "rehabilitation" cover particular aspects of reparation.

enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.

Individuals and collectivities as victims

14. It cannot be denied that both individuals and collectivities are often victimized as a result of gross violations of human rights. Most of the gross violations listed in the previous paragraph inherently affect rights of individuals and rights of collectivities. This was also assumed in Sub-Commission resolution 1989/13 which provided some useful guidelines with respect to the question of who is entitled to reparation. In this regard the resolution mentions in its first preambular paragraph "individuals, groups and communities". In the next part of this section, which will deal with some special issues of interest and attention, the individual and collective aspects of victimized persons and groups are in many instances closely interrelated. This coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly.

15. For the sake of determining the notion of victim, both individually and collectively, it is useful to refer to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 4/ and in particular to the following phrases from paragraphs 1 and 2 of the Declaration:

> "'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights (...).
>
> "... The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".

Special issues of interest and attention

16. In the following paragraphs a number of special issues will be reviewed because they may be of interest to the general orientation of the study or because they were raised in earlier stages in the discussion by the Sub-Commission of the preliminary report and the progress reports relating to the present study. Inasmuch as these special issues would not easily fit in the context of other chapters, they find their most suitable place in the present chapter. Most of these special issues will serve to demonstrate that the parameters of the present study are shaped by the notion of serious damages and grave injuries to human dignity, to the physical and moral integrity of the human person and to the very existence of groups, communities and peoples, which result in legitimate claims to reparation on the part of those who are victimized.

17. Vital to the life and well-being of indigenous peoples are land rights and rights relating to natural resources and the protection of the environment. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous peoples to compensation in the case of damages resulting from exploration and exploitation programmes pertaining to their lands, 5/ and in case of relocation of indigenous peoples. 6/ The draft declaration on the rights of indigenous peoples recognizes the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those territories which were lost. 7/

18. As regards environmental damage, which may affect a range of human rights, notably the right to life and the right to a standard of living adequate for health and well-being, it is useful to keep in mind the Rio Declaration on Environment and Development, adopted on 14 June 1992 by the United Nations Conference on Environment and Development. 8/ Principle 13 of the Rio Declaration, which is largely based on principle 22 of the Stockholm Declaration of the United Nations Conference on the Human Environment, reads as follows:

> "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction".

19. The plight of survivors of Nazi concentration camps who had been victims of scientific experiments received special attention at a certain time in the history of the United Nations. This matter was taken up by the Commission on the Status of Women at its fourth session 9/ and led to the adoption by the Economic and Social Council of resolution 353 (XII) of 19 March 1951, in which the Council appealed to the competent German authorities to consider making the fullest possible reparation for the injuries suffered, under the Nazi regime, by persons subjected to so-called scientific experiments in concentration camps. In reply 10/ the Government of the Federal Republic of Germany stated that it was prepared, in special cases of need, to afford practical assistance to the surviving victims of experiments on human beings then living abroad, who were persecuted on grounds of race, religion, opinions or political convictions, and were ineligible for reparation under the compensation laws in force in the Länder of the Federal Republic, whether because they lacked residential qualifications or because the time-limit for submission of applications had expired. Victims of experiments who were ineligible for reparation on other grounds would not be denied assistance if their health had been permanently impaired through gross disregard of human

rights. The Economic and Social Council, in resolution 386 (XIII) of 15 September 1951, welcomed the decision taken by the Government of the Federal Republic of Germany in assuming responsibility for this problem and appealed to that Government to render on the most generous scale possible the assistance it had undertaken to provide.

20. The conduct and the activities of parties in situations of armed conflict causing injuries and damages often give rise to claims for compensation. Thus, the United Nations General Assembly gave support, in a series of resolutions under the heading "Remnants of war", to the demand of developing countries affected by the implantation of mines on their lands for compensation for the losses incurred from the States which planted the mines. 11/ More recently, the Security Council reaffirmed that Iraq is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait; and decided to create a fund to pay compensation for claims that fall within these terms and to establish a Commission for administering the fund. 12/ This issue will be reviewed in more detail in section V of this report.

21. The issue of forced removals and forced evictions has in recent years reached the international human rights agenda because it is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities. The Committee on Economic, Social and Cultural Rights, in its General Comment 4 (adopted at its sixth session in 1991) on the right to adequate housing, deemed legal procedures seeking compensation following an illegal eviction one of the possible remedies in connection with the right to adequate housing. 13/ The Commission on Human Rights, in its resolution 1993/77 on the subject of forced evictions, recommended that all Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities which have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups (para. 4).

22. The issue of violence against women has become a matter of urgent and widespread concern and is highly relevant in the context of the present study about the right to reparation for the victims. In the draft Declaration on the Elimination of Violence Against Women, prepared and adopted in March 1993 by the Commission on the Status of Women and submitted for adoption by the General Assembly, States are called upon to pursue by all appropriate means and without delay a policy of eliminating violence against women. The draft Declaration describes "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or

private life" (art. 1). Among the remedial and reparational measures that should form part of a policy of eliminating violence against women, article 4 of the draft Declaration lists, inter alia, the following:

(a) Refraining from engaging in violence against women (subpara. (b));

(b) The exercise of due diligence to prevent, investigate and punish acts of violence against women (subpara. (c));

(c) The provision of access to the mechanisms of justice and to just and effective remedies for the harm suffered (subpara. (d));

(d) Development of preventive approaches and ensuring that the revictimization of women does not occur because of gender-insensitive laws, enforcement practices and other interventions (subpara. (f));

(e) Ensuring specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, health and social services, facilities and programmes, as well as support structures and all other measures to promote the safety and physical and psychological rehabilitation of the victimized women and their children (subpara. (g)).

The Declaration also recommends the adoption of all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women (art. 4, subpara. (j)).

23. As regards contemporary forms of slavery, the Working Group on this subject asked the Special Rapporteur at its seventeenth session to collaborate with the Working Group and to make recommendations especially in connection with contemporary forms of slavery and take into account the need for moral compensation for victims of the slave trade and other early forms of slavery. 14/ In this connection the Special Rapporteur wishes to make it clear that he considers the type of practices which the Working Group on Contemporary Forms of Slavery seeks to prevent, abolish and combat, viz. the sale of children, child prostitution, child labour, debt bondage, traffic in persons and the exploitation of the prostitution of others, as gross violations of human rights which are generally covered by this study. As to remedies and reparations for the victims of these practices, the Special Rapporteur refers in the first place to the proposed basic principles and guidelines included in section IX of the present study which are intended to have general applicability. In addition, special features which are intrinsic to the nature of these evil practices have to be taken into account, such as the extreme vulnerability of the persons affected and the transnational aspects of certain of these practices. In the same manner as on the issue of violence against women, referred to in paragraph 22 above, the Special Rapporteur favours the elaboration of a broad gamut of special remedial and reparational measures, ranging from restitution and compensation to rehabilitation, satisfaction, prevention and guarantees of non-repetition. This task will have to be carried out on the basis of intimate knowledge of the subject-matter.

24. The Working Group on Contemporary Forms of Slavery also referred to the need for moral compensation for victims of the slave trade and other early forms of slavery. This problem was also touched upon by two African members of the Sub-Commission in connection with the issue of compensation to the African descendants of the victims of gross violations of human rights by colonial Powers. 15/ In this respect the Special Rapporteur would draw attention to the report of the Secretary-General on the international dimensions of the right to development as a human right in which a series of ethical aspects of the right to development were listed, among these a moral duty of reparation to make up for past exploitation by the colonial Powers and some others. The Secretary-General noted that acceptance of such a moral duty is by no means universal. 16/ Perhaps more to the point on this issue are some recommendations included in the study on the achievements made and obstacles encountered during the Decades to Combat Racism and Racial Discrimination, prepared by Special Rapporteur Mr. A. Eide. 17/ In the section of recommendations relating to situations originating in slavery, the following are pertinent in the present context:

(a) Research should be carried out in the countries concerned to determine the degree to which descendants of persons held as slaves continue to suffer from social handicaps or deprivations (recommendation 17);

(b) Effective affirmative action should be carried out until such time as members of these groups experience no further handicaps or deprivations. Such affirmative action should not be construed to constitute discrimination against members of the dominant society (recommendation 18).

While it would be difficult and complex to construe and uphold a legal duty to pay compensation to the descendants of the victims of the slave trade and other early forms of slavery, the present Special Rapporteur agrees that effective affirmative action is called for in appropriate cases as a moral duty. In addition, an accurate record of the history of slavery, including an account of the acts and the activities of the perpetrators and their accomplices and of the sufferings of the victims, should receive wide dissemination through the media, in history books and in educational materials.

25. Finally, the Working Group on Contemporary Forms of Slavery addressed a request to the Secretary-General that he submit to the Special Rapporteur information received by the Working Group regarding the situation of women forced to engage in prostitution during wartime. This request was endorsed by the Sub-Commission in its resolution 1992/2, paragraph 18. Regarding this question the Special Rapporteur refers to the letter he wrote to the Working Group in which he indicated his readiness to undertake a study on the situation of women forced to engage in prostitution during wartime on the basis of the documentation received and in the light of the proposed basic principles and guidelines included in the present report. 18/ The Special Rapporteur affirms that he is prepared to undertake such a study in the capacity of an individual expert if he is requested to do so.

II. RELEVANT EXISTING INTERNATIONAL NORMS

A. International human rights norms (global and regional human rights instruments)

26. A number of both universal and regional human rights instruments contain express provisions relating to the right of every individual to an "effective remedy" by competent national tribunals for acts violating human rights which are granted to him by the constitution or by law. Such formulation is contained in article 8 of the Universal Declaration of Human Rights. The notion of an "effective remedy" is also included in article 2 (3) (a) of the International Covenant on Civil and Political Rights and in article 6 of the Declaration on the Elimination of All Forms of Racial Discrimination.

27. Some human rights instruments refer to a more particular "right to be compensated in accordance with the law" (art. 10 of the American Convention on Human Rights) or the "right to an adequate compensation" (art. 21 (2) of the African Charter on Human and Peoples' Rights).

28. Even more specific are the provisions of article 9 (5) of the International Covenant on Civil and Political Rights and of article 5 (5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which refer to the "enforceable right to compensation". Similarly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains a provision providing for the victim of torture a redress and "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible" (art. 14 (1)). Also, the Declaration on the Protection of All Persons from Enforced Disappearance provides that the victims of acts of enforced disappearance and their families shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible (art. 19).

29. In some instruments, a specific provision is contained indicating that compensation is due in accordance with law or with national law (art. 14 (6) of the International Covenant on Civil and Political Rights and art. 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

30. Provisions relating to reparation or satisfaction of damages are contained in the International Convention on the Elimination of All Forms of Racial Discrimination, article 6 of which provides for the right to seek "just and adequate reparation or satisfaction for any damage suffered". The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries also refers to "fair compensation for damages" (art. 15 (2)), to "compensation in money" and "under appropriate guarantees" (art. 16 (4)), and to full compensation "for any loss or injury" (art. 16 (5)).

31. The American Convention on Human Rights speaks of "compensatory damages" (art. 68) and provides that the consequences of the measure or situation that constituted the breach of the right or freedom "be remedied" and that "fair compensation be paid to the injured party" (art. 63 (1)).

32. The Convention on the Rights of the Child contains a provision to the effect that States parties shall take all appropriate measures to promote "physical and psychological recovery and social reintegration of a child victim ..." (art. 39).

B. Norms in the area of crime prevention and criminal justice

33. Substantial provisions relating to various questions of restitution, compensation and assistance for victims of crime are contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985). The Declaration provides for the following:

(a) Victims are entitled to prompt redress for the harm that they have suffered;

(b) They should be informed of their rights in seeking redress;

(c) Offenders or third parties should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights;

(d) When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation;

(e) Victims should receive the necessary material, medical, psychological and social assistance and support.

The Declaration also provides that Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions (principle 9).

34. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") contains a specific provision to the effect that "in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims" (rule 11.4).

C. International humanitarian law norms

35. Article 3 of The Hague Convention Regarding the Laws and Customs of Land Welfare provides for the obligation of the contracting party to pay indemnity in case of violation of the regulations. Article 41 of The Hague Regulations annexed to the same Convention also provides for the right to demand an indemnity for the losses sustained in cases of violations of the clauses of the armistice by individuals.

36. The Four Geneva Conventions of 12 August 1949 contain similar articles providing that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or

another High Contracting Party" in respect of grave breaches involving such acts as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". 19/

37. Article 68 of the Geneva Convention relative to the Treatment of Prisoners of War contains specific provisions with regard to claims for compensation by a prisoner of war.

38. Article 55 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War provides that the Occupying Power "shall make arrangements to ensure that fair value is paid for any requisitioned goods".

39. Finally, Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts), states in its article 91 that a party to the conflicts which violates the provisions of the Conventions or of this Protocol "shall ... be liable to pay compensation".

III. STATE RESPONSIBILITY

40. In international law State responsibility arises from an internationally wrongful act of a State. The elements of such internationally wrongful act are: (a) conduct consisting of an action or omission that is attributable to the State under international law, and (b) conduct that constitutes a breach of an international obligation of the State. 20/ The International Law Commission, in further describing a breach of an international obligation, distinguished between international crimes and international delicts. An international crime is the breach of an international obligation so essential for the protection of fundamental interests of the international community that it is recognized as a crime by that community as a whole. To this category belong, inter alia, serious breaches of international obligations of essential importance with regard to the maintenance of international peace and security, the right to self-determination of peoples, the safeguarding and preservation of the human environment and, most relevant in the context of the present study, serious breaches "on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid". 21/ An international delict is any internationally wrongful act which is not an international crime.

41. With regard to the international law of human rights the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognized human rights. Such obligation has its legal basis in international agreements, in particular international human rights treaties, and/or in customary international law, 22/ in particular those norms of customary international law which have a peremptory character (jus cogens). 23/ It is generally accepted by authoritative opinion that States do not only have the duty to respect internationally recognized human rights but also the duty to ensure these rights, which may imply an obligation to ensure compliance with international obligations by private persons and an obligation to prevent violations. 24/ If Governments fail to apply due diligence in responding adequately to or in structurally preventing human rights violations, they are legally and morally responsible. 25/ It should also be kept in mind that successor Governments remain to be bound by the responsibility incurred by predecessor Governments for wrongful acts committed by them and not repaired by them as a matter of State responsibility.

42. The question now arises towards whom States are responsible when they breach their human rights obligations under international law. In traditional international law the offending State carries responsibility for its conduct vis-à-vis the injured State at the inter-State level. This means in terms of human rights that it is a matter of State responsibility if a State causes injury to a national of another State inasmuch as the offending State violates internationally recognized human rights which the State is bound to respect and ensure with respect to all persons. In traditional international law the subject who has suffered the injury is not the individual person, or for that matter a group of persons, but the State of which the person or the group of persons is or are national(s). It is in this perspective that States may claim reparation from the offending State but the victims themselves have no standing to bring international claims. 26/

43. It should be noted, however, that the International Law Commission, in the second series of draft articles on State responsibility it adopted at first reading, in its description of the concept of "injured State" has not limited this concept to rights and interests infringed upon that immediately pertain to that State, but has also denoted the concept of "injured State" when the right infringed upon arises from a multilateral treaty or a rule of customary international law and has been created or is established for the protection of human rights and fundamental freedoms. 27/ As was stated in the relevant Commentary of the International Law Commission, the interests protected by human rights provisions are not to be allocated to a particular State; hence the necessity to consider in the first instance every other State party to the multilateral convention, or bound by the relevant rule of customary law, as an injured State. 28/ Possible collective aspects of State responsibility are further highlighted by the International Law Commission when it held in the same context that "injured State" may mean any State party to a multilateral treaty if the right infringed upon has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto. 29/ In addition, the International Law Commission related the concept of "injured State" to all other States than the offending State if the internationally wrongful act constitutes an international crime. 30/

44. The identification of collective aspects of State responsibility as evidenced in the drafting work of the International Law Commission is in consonance with the growing trend in international human rights law that State responsibility under multilateral human rights treaties or under customary law of human rights is not only due to the "injured State" but to the community of nations. This was also the underlying principle in the opinion of the European Commission of Human Rights when it held that a State party to the European Convention on Human Rights claiming a violation of the Convention is not enforcing its own rights, or the rights of its nationals, but vindicating the public order of Europe:

> "In becoming a Party to the Convention, a State undertakes, vis-à-vis the other High Contracting Parties, to secure the rights and freedoms defined in Section I [of the European Convention on Human Rights] to every person within its jurisdiction, regardless of his or her nationality or status ... it undertakes to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons ... The obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves." 31/

The underlying principle that State responsibility under multilateral human rights treaties entails obligations vis-à-vis the collectivity or community of nations that are bound to respect and ensure the rights enshrined in those treaties may also be considered applicable when the obligations derive from customary international law of human rights, in conformity with the language

of the Barcelona Traction Judgment of the International Court of Justice, where the Court declared that all States have the right to vindicate erga omnes obligations. As the Court stated:

> "... an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character". 32/

It can be concluded that when a State breaches an obligation erga omnes, it injures the international legal and public order as a whole and consequently every State may have a right and an interest to bring an action against the offending State. 33/

45. It may therefore be assumed that the concept of State responsibility for breaches of internationally recognized human rights standards has legal implications with respect to the "injured State" in the traditional sense and, as the case may be, all other States participating in a legal order created by a multilateral human rights treaty - to the extent that rights and interests of all these participating States may be "injured" - and with respect to the entire international community, in particular when the offending State has breached human rights obligations which are of an erga omnes character. Another aspect of the question is whether State responsibility not only comes into play with respect to States participating in the international legal order but also more directly with respect to persons within the jurisdiction of the offending State whenever these persons are the victims of violations of internationally recognized human rights committed by that State. As regards human rights treaty law the Inter-American Court left no doubt that the American Convention on Human Rights envisages essentially the protection of individuals and that State responsibility prevails in their interest. In an advisory opinion the Inter-American Court held:

> "... modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction ..." 34/

It may therefore be stated that the obligations resulting from State responsibility for breaches of international human rights law entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches. The principal right these victims are entitled to under international law is the right to effective remedies and just reparations.

46. Under international law, a State that has violated a legal obligation is required to terminate the violation and to make reparation, including in appropriate circumstances restitution or compensation for loss or injury. 35/ As noted in the previous paragraphs, the injured subject to whom the reparation is due may be a State directly injured, a collectivity of States - in particular in the case of breach of obligations erga omnes - and/or an individual person or group of persons who are victims of breaches of internationally recognized human rights. In the context of the present study, the injured person or group of persons, being victims of gross violations of human rights, are the central concern. These persons may be nationals of the offending State, nationals of other States or stateless persons. In the review of relevant existing international human rights norms in section II of this study, reference was made to express provisions contained in universal and regional human rights instruments which recognize the right to an "effective remedy" by competent national tribunals for acts violating human rights.

47. The International Law Commission in the continuation of its work on the topic of State responsibility has now received from its Drafting Committee the texts adopted on first reading by the Drafting Committee on a number of articles of Part Two of the draft articles which are of particular relevance to the present study. 36/ These articles pertain to cessation of wrongful conduct (art. 6), reparation (art. 6 bis) restitution in kind (art. 7), compensation (art. 8), satisfaction (art. 10), and assurances and guarantees of non-repetition (art. 10 bis). 37/ These draft articles are still in a preliminary stage of consideration by the International Law Commission and were mainly drawn up in the perspective of inter-State relations and therefore not primarily aimed at the relation between States and individuals. It would be desirable if in further codification work relating to "State responsibility" more attention be given to those aspects of State responsibility that pertain to the obligation of States to respect and to ensure human rights. Nevertheless, these articles, albeit drawn up with a different perspective in mind, contain elements that are also most pertinent in the context of the present study. A few of those elements must be highlighted.

48. First, the need of cessation of wrongful conduct when this has a continuing character and the entitlement of the injured party to obtain assurances of guarantees of non-repetition of the wrongful act (arts. 6 and 10 bis). Second, full reparation can take the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition. It is also stipulated that the State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation (art. 6 bis). Third, restitution in kind is the re-establishment of the situation that existed before the wrongful act was committed (art. 7) and, in so far as the

damage is not made good by restitution in kind, compensation is to be provided which covers any economically assessable damage sustained by the injured party (art. 8). Fourth, satisfaction for damage, in particular moral damage, is to be obtained if and to the extent necessary to provide full reparation and may take the form of (a) an apology, (b) nominal damages, (c) in case of gross infringements of rights, damages reflecting the gravity of the infringement, (d) in cases of serious misconduct or criminal conduct, disciplinary action, or punishment of, those responsible (art. 10).

49. International judicial bodies, such as the Human Rights Committee and the Inter-American Court of Human Rights, taking up complaints of victims of violations of the rights recognized and guaranteed in international human rights treaties, have developed a substantial body of case law in which they have defined State responsibility in terms of duties which offending States are under an obligation to carry out. The relevant case law is reviewed in section IV of this study and follows closely the pattern outlined in the previous paragraphs. One of the clearest pronouncements comes in this regard from the Inter-American Court's judgment in the Velásquez Rodriguez case where the Court stated:

> "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation." 38/

IV. RELEVANT DECISIONS AND VIEWS OF INTERNATIONAL HUMAN RIGHTS ORGANS

A. The Human Rights Committee

50. Under the Optional Protocol to the International Covenant on Civil and Political Rights the Human Rights Committee may receive and consider communications from individuals who claim to be victims of a violation by a State party of any rights set forth in the Covenant. The decisions of the Human Rights Committee are referred to as "views" in article 5, paragraph 4, of the Optional Protocol. After the Committee has made a finding of a violation of one or more provisions of the Covenant, it usually proceeds to ask the State party to take appropriate steps to remedy the violation. The basis for such remedy is article 2, paragraph 3, of the Covenant, according to which each State party undertakes to ensure that any person whose rights or freedoms as recognized in the Covenant are violated shall have an effective remedy. More specific provisions on compensation are contained in article 9, paragraph 5, of the Covenant, which provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation and in article 14, paragraph 6, which provides for compensation, when a person has suffered punishment as a result of a miscarriage of justice.

51. By the conclusion of its forty-fifth session (July 1992) the Human Rights Committee had formulated its views under article 5, paragraph 4, of the Optional Protocol with regard to 138 communications. 39/ While the case law of the Human Rights Committee has dealt with the great majority of the provisions of the Covenant, the issue of providing remedies, including compensation, to victims of violations of the Covenant came up most prominently with respect to:

(a) The right to life (art. 6 of the Covenant);

(b) The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (art. 7);

(c) The right to liberty and security of person (art. 9), including:

(i) The right not to be subjected to arbitrary arrest and detention (art. 9 (1));,

(ii) The right to be brought promptly before a judge and tried within a reasonable time (art. 9 (3));

(iii) The right to challenge one's arrest and detention (or the remedy of habeas corpus) (art. 9 (4));

(d) The right to be treated humanely during imprisonment (art. 10);

(e) The right to a fair hearing (art. 14), including:

(i) A fair and public hearing by a competent, independent and impartial tribunal (art. 14 (1));

(ii) Minimum guarantees in the determination of any criminal charge, notably the right to communicate with counsel (art. 14 (3) (b));

(iii) The right to legal assistance of one's own choosing (art. 14 (3) (b) and (d));

(iv) The right to be tried without undue delay (art. 14 (3) (c));

(v) The right to examine witnesses (art. 14 (3) (e));

(vi) The right not to incriminate oneself (art. 14 (3) (g));

(vii) The right to review of conviction and sentence (art. 14 (5)). 40/

In most communications where the Human Rights Committee acted under article 5, paragraph 4, of the Optional Protocol, the Committee found, in so far as it concluded that the Covenant was violated, that such violation not only pertained to one of the above-mentioned provisions but to a number of them in conjunction.

52. It is not the purpose of the present study to deal in substance with the provisions of the Covenant and the case law of the Human Rights Committee in so far as the Committee has applied and interpreted the provisions of the Covenant. This study merely seeks to find out how the Committee, when it is of the view that the Covenant has been violated, approaches the question of remedies, including compensation. Without ignoring the views of the Committee with respect to violations of other provisions of the Covenant, the Special Rapporteur feels that a selection of those communications is most instructive for present purposes where the facts mainly disclosed a violation of article 6 (right to life) and/or article 7 (right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment). As the Human Rights Committee once indicated, these violations are of a special gravity (case No. 194/1985 Jean Miango Miuyo v. Zaire).

53. The following cases pertain to the right to life:

(a) In case No. 30/1978 (Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay) it was the Committee's view that articles 7, 9 and 10 (1) of the Covenant had been violated and that there were serious reasons to believe that the ultimate violation of article 6 had been perpetrated by the Uruguayan authorities. As regards the latter point the Committee urged the Government to reconsider its position in this case and to take effective steps (i) to establish what had happened to Eduardo Bleier since October 1975, to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he had suffered; and (ii) to ensure that similar violations did not occur in the future;

(b) In case No. 45/1979 (Pedro Pablo Camargo v. Colombia) the Committee was of the view that all other violations which might have happened in that

case were subsumed under the even more serious violations of article 6. The Committee was accordingly of the view that the State party should take the necessary measures to compensate the husband of the person killed (as a result of the deliberate action of the police) and to ensure that the right to life was duly protected by amending the law;

(c) In case No. 84/1981 (Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermig Barbato v. Uruguay) the Committee was of the view that, with respect to one person, article 6 had been violated because the authorities had failed to take appropriate measures to protect his life while in custody. With respect to the other person, the Committee held that the facts disclosed violation of articles 9 (3) and (4) and 14 (3) (c). The Committee was accordingly of the view that the State party was under an obligation to take effective steps (i) to establish the facts of the death, to bring to justice any persons found to be responsible for the death and pay appropriate compensation to the family; (ii) with respect to the other person, to ensure strict observance of all the procedural guarantees prescribed by article 14, as well as of the rights of detained persons set forth in articles 7, 9 and 10; (iii) to transmit a copy of these views to the person concerned; and (iv) to take steps to ensure that similar violations did not occur in the future;

(d) In case No. 107/1981 (Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v. Uruguay) the Committee was of the view that the mother of the disappeared daughter had lived under anguish and stress because of the disappearance of her daughter and the continuing uncertainty concerning her fate and whereabouts. The mother had the right to know what had happened to her daughter. In this respect the mother too was a victim of the violations of the Covenant suffered by her daughter, in particular of article 7. As regards the daughter, the Committee concluded that responsibility for her disappearance fell on the authorities of Uruguay and that, consequently, that Government should take immediate and effective steps: (i) to establish what had happened to the disappeared person since 18 June 1976, and to secure her release; (ii) to bring to justice any persons found to be responsible for her disappearance and ill-treatment; (iii) to pay compensation for the wrongs suffered; and (iv) to ensure that similar violations did not occur in the future;

(e) In case No. 146/1983 and 148-154/1983 (John Khemraadi Baboeram et al. v. Suriname) the Committee was of the view that the victims were arbitrarily deprived of their lives in violation of article 6. The Committee urged the State party to take effective steps (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life was duly protected in Suriname;

(f) In case No. 161/1983 (Joaquin David Herrera Rubio v. Colombia) the Committee concluded that article 6 of the Covenant had been violated because the State party had failed to take appropriate measures to prevent the disappearance and subsequent killings of the parents of the author of the communication and to investigate effectively the responsibility for their murder. Moreover, the Committee held that, with respect to the author of the

communication, articles 7 and 10, paragraph 1, had been violated because he had been subjected to torture and ill-treatment during his detention. The Committee was accordingly of the view that the State party was under an obligation, in accordance with the provisions of the Covenant, to take effective measures to remedy the violations that the author had suffered and further to investigate the said violations, to take action thereon as appropriate and to take steps to ensure that similar violations did not occur in the future;

(g) In case No. 194/1985 (Jean Miango Muiyo v. Zaire) the Committee found that the facts disclosed a violation of articles 6 and 7 of the Covenant. The Committee urged the State party to take effective steps (i) to investigate the circumstances of the death of the victim; (ii) to bring to justice any person found to be responsible for his death; and (iii) to pay compensation to his family;

(h) In case No. 181/1984 (A. and H. Sanjuán Arévalo v. Colombia) the Committee found that the right to life enshrined in article 6 of the Covenant and the right to liberty and security of the person laid down in article 9 of the Covenant had not been effectively protected by the State party concerned. The Committee stated that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views and, in particular, invited that State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers.

54. The following cases pertain to the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment:

(a) In case No. 63/1979 (Vileta Setelích v. Uruguay) the Human Rights Committee found violations of articles 7 and 10 (1), 9 (3), 14 (3) (a), 14 (3) (b), 14 (3) (c), 14 (3) (d) and 14 (3) (e) of the Covenant. The Committee was of the view that the State party was under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective measures to the victim, and in particular to extend to the victim (Raúl Sendic) treatment laid down for detained persons in articles 7 and 10 of the Covenant and to give him a fresh trial with all the procedural guarantees prescribed by article 14 of the Covenant. The State party must also ensure that the victim received promptly all necessary medical care;

(b) In case No. 25/1978 (Carmen Améndola and Graciela Baritussio v. Uruguay) the Committee found, in respect of one victim, violations of articles 7 and 10 (1) and article 9 (1) of the Covenant and, with respect to the other victim, violations of article 9 (1) and 9 (4). The Committee was of the opinion that the State party was under an obligation to provide the victims with effective remedies, including compensation, for the violations they had suffered. The State party was also urged to investigate the allegations of torture made against the persons in the case;

(c) In case No. 80/1980 (Elena Beatriz Vasilskis v. Uruguay) the Committee found violations of articles 7 and 10 (1), and of article 14 (1),

14 (3) (b) and (d) and 14 (3) (e) of the Covenant. The Committee was of the view that the State party was under an obligation to take immediate steps (i) to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victim and, in particular, to extend to the victim treatment as laid down for detained persons in article 10 of the Covenant; (ii) to ensure that she received all necessary medical care; (iii) to transmit a copy of these views to her; (iv) to ensure that similar violations did not occur in the future;

(d) In case No. 88/1981 (Gustavo Raúl Larrosa Bequio v. Uruguay) the Committee found violations of the Covenant with respect to the victim, in particular articles 7 and 10 (1). The Committee was of the view that the State party was under an obligation to take immediate steps (i) to ensure strict observance of the provisions of the Covenant and provide effective remedies to the victim, in particular, to extend to the victim treatment as laid down for detained persons in article 10 of the Covenant; (ii) to ensure that he received all necessary medical care; (iii) to transmit a copy of these views to him; and (iv) to take steps to ensure that similar violations did not occur in the future;

(e) In case No. 110/1981 (Antonio Vianna Acosta v. Uruguay) the Committee concluded that articles 7 and 10 (1), as well as article 14 (3) (b) and (d) and 14 (3) (c) of the Covenant had been violated. The Committee was of the view that the State party was under an obligation to provide the victim with effective remedies and, in particular, with compensation for physical and mental injury and suffering caused to him by the inhuman treatment to which he had been subjected;

(f) In case No. 124/1982 (Tshitenge Muteba v. Zaire) the Committee found violations of articles 7 and 10 (1) and of articles 9 (3), 9 (4), 14 (3) (b), (c) and (d) and 19 of the Covenant. The Committee was of the view that the State party was under an obligation to provide the victim with effective remedies, including compensation, for the violations which he had suffered, to conduct an inquiry into the circumstances of his torture, to punish those found guilty of torture and to take steps to ensure that similar violations did not occur in the future;

(g) In case No. 176/1984 (Walter Lafuente Peñarrieta et al. v. Bolivia) the Committee concluded that violations of the Covenant had occurred with respect to article 7 and articles 9 (3) and 10 (1) and article 14 (3) (b). The Committee was of the view that the State party was under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victims, to grant them compensation, to investigate the violations, to take action thereon as appropriate and to take steps that similar violations did not occur in the future.

55. The above review of case law of the Human Rights Committee, involving violations of, particularly, articles 6 and 7 of the Covenant, brings out that there exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at the prevention of the recurrence of

similar violations and the issue of the follow-up given by the State party concerned with respect to remedies called for in the Committee's view. It is useful to pay somewhat more attention to these three elements.

56. As regards the obligation of States parties to ensure that persons whose rights and freedoms are violated have an effective remedy (art. 2, para. 3, of the Covenant), the Committee, in addition to stating its opinion that States parties are under an obligation to take effective measures to remedy violations, has spelled out specific types of remedies that are called for, depending on the nature of violations and the condition of the victim(s). Consequently, the Human Rights Committee has repeatedly expressed the view that the State party is under an obligation:

(a) To investigate the facts;

(b) To take action thereon as appropriate;

(c) To bring to justice persons found to be responsible;

(d) To extend to the victim(s) treatment in accordance with the provisions and the guarantees of the Covenant;

(e) To provide medical care to the victim(s);

(f) To pay compensation to the victim(s) or to his (her) family.

57. As regards the obligation to pay compensation, the Human Rights Committee has used a variety of formulations:

(a) Compensation to the victim (the disappeared person) of his family for any injury which he has suffered (No. 30/1978);

(b) Compensation to the husband for the death of his wife (No. 45/1979);

(c) Appropriate compensation to the family of the person killed (No. 84/1981);

(d) Compensation for the wrongs suffered (No. 107/1981);

(e) Compensation for physical and mental injury and suffering caused to the victim by the inhuman treatment to which he was subjected (No. 110/1981);

(f) Compensation to the surviving families (Nos. 146/1983 and 148-154/1983).

In this respect two observations should be made. First, it may be assumed that in the Committee's views the basis for determining the amount or nature of the compensation is not only physical injury or damage but also mental injury or damage. Second, it is not fully clear whether the Committee recognizes, in the case of the death or disappearance of a person, that family members are in their own right entitled to compensation because of their own

sufferings and anguish or that family members are entitled to compensation for the injury inflicted upon the immediate victim. At least in one case (No. 107/1981) the Committee ruled that the mother of the disappeared person had herself also been a victim.

> "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in particular of article 7." (para. 14).

The Committee urged that compensation be paid for the wrongs suffered, presumably for the wrongs suffered by both the disappeared daughter and the mother.

58. The preventive aspect of the remedies is constantly underlined by the Human Rights Committee in its frequent calls upon States parties "to take steps to ensure that similar violations do not occur in the future". Equally, the Committee has repeatedly expressed the view that States parties are under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant. More particularly with regard to the right to life the Committee urged, by way of preventive action, that the State party concerned ensure the due protection of that right by amending the law (No. 45/1979).

59. After expressing its views under the Optional Protocol to the Covenant, the Human Rights Committee remained in many cases unaware whether States parties were in fact complying with these views. Often the Committee received information or had reasons to assume that States parties had not provided any appropriate remedy as requested by the Committee. The Committee has taken certain steps to cope with this unsatisfactory state of affairs. One particular State party which initially ignored the views of the Committee was repeatedly requested by the Committee to transmit a copy of its views to the victim(s) concerned. More recently the Committee has been attempting to develop a dialogue with States parties concerned, with a view to encouraging the implementation of remedial measures. For example, the Committee stated in a particular case (No. 181/1984) that it would welcome information on any relevant measures introduced by the State party in respect of the Committee's views and, in particular, invited the State party to inform the Committee of further developments in the investigation of the disappearance of the victims. In order more systematically to follow developments or the lack thereof with respect to the implementation of remedial measures after the Committee has issued its views, the Committee decided on 24 July 1990 to appoint a Special Rapporteur for the follow-up of views. 41/ One of the duties of the Special Rapporteur is to recommend to the Committee action upon all letters of complaint received from individuals held, in the views of the Committee under the Optional Protocol, to have been victims of a violation, and who claim that no appropriate remedy has been provided. This issue of follow-up monitoring is not only essential for the sake of rendering remedial justice to victims and for upholding the authority of an important human rights body such as the

Human Rights Committee, it is also an important element to be kept in mind in the broader framework of the study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.

B. The Committee on the Elimination of Racial Discrimination

60. Under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, individuals or groups of individuals who claim that any of their rights enumerated in the Convention have been violated by a State party, and who have exhausted all available domestic remedies, may submit written communications to the Committee on the Elimination of Racial Discrimination for its consideration. As of 1 January 1993, only 16 of the 132 States that have ratified or acceded to the Convention had declared that they recognize the competence of the Committee to receive and consider communications under article 14 of the Convention. The Committee has as yet dealt with only a few communications. Of relevance from the point of view of providing remedial relief is case No. 1/1984 (Yilmaz-Dogan v. the Netherlands), in which the Committee, acting under article 14, paragraph 7, of the Convention, concluded that the petitioner had not been afforded protection as regards equality before the law in respect of her right to work (art. 5 (e) (1) of the Convention). The Committee suggested that the State party take this into account and recommended that it ascertain whether the petitioner was in the meantime gainfully employed and, if not, that it use its good offices to secure alternative employment for her and/or to provide her with such other relief as might be considered equitable. In the more recent case No. 4/1991 (L. Karim v. the Netherlands) the Committee found that in view of the inadequate response on the part of the Netherlands authorities to the racial incidents of which the petitioner was a victim, the police and judicial proceedings did not afford the petitioner effective protection and remedies within the meaning of article 6 of the Convention. One of the Committee's recommendations was that the State party provide the petitioner with relief commensurate with the moral damage he has suffered.

C. The Committee against Torture

61. Under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, individuals who claim that any of their rights enumerated in the Convention have been violated by a State party and who have exhausted all available domestic remedies may submit written communications to the Committee against Torture for its consideration. As of 1 January 1993, 28 out of 70 States parties had declared that they recognize the competence of the Committee to receive and consider communications under article 22 of the Convention. In cases Nos. 1/1988, 2/1988, 3/1988 (O.R., H.M. and M.S. v. Argentina) the petitioners, relatives of three deceased victims of torture, challenged the "Due Obedience Act" and the "Punto Final" ("Final Stop") as being incompatible with the State party's obligations under the Convention. The Committee declared that communications inadmissible ratione temporis inasmuch as the Convention could not be applied retroactively.

62. However, in a remarkable obiter dictum which is most relevant to the subject matter of the present study, the Committee observed that the laws in question were incompatible with the spirit and purpose of the Convention. The Committee urged the State party not to leave the victims of torture and their dependants without a remedy. The Committee felt that if civil action for compensation was no longer possible because the period of limitations for lodging such action had run out, it would welcome, in the spirit of article 14 of the Convention (dealing with the enforceable right to fair and adequate compensation), the adoption of appropriate measures to enable adequate compensation. The Committee indicated that it would welcome receiving from the State party detailed information concerning the number of successful claims for compensation for victims of acts of torture during the "dirty war" or for their dependants, including the criteria for eligibility for such compensation. Soon after the Committee had formulated its views it received a substantive reply from the Government of Argentina. 42/

63. Two aspects should be highlighted with respect to the above-mentioned cases. First, in spite of the fact that the Committee against Torture declared the communications inadmissible ratione temporis, the Committee, very mindful of the important principles involved in the cases in question, chose to make known its strong views on the substance and to impress upon the Government concerned the need to take remedial action, including the provision of adequate compensation. Second, following the policy and the practice of the Human Rights Committee, the Committee against Torture made itself available to enter into a dialogue with the Government concerned on questions relating to redress and remedies for the victims and their relatives.

D. The Committee on the Elimination of Discrimination against Women

64. This Committee was established under the Convention on the Elimination of All Forms of Discrimination against Women for the purpose of considering the progress made in the implementation of the Convention (art. 17). The Committee has not developed case law because it has not the authority to receive and examine communications alleging violations of the Convention. However, the Committee has adopted a good number of general recommendations in accordance with article 21 of the Convention.

65. An important text is General Recommendation No. 19 on Violence against Women, adopted by the Committee at its eleventh session in 1992. 43/ It should be recalled that the Commission on the Status of Women adopted a draft declaration on the same subject (see para. 22, supra). General Recommendation No. 19 contains an important statement on State responsibility: "Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". 44/

66. General Recommendation No. 19 is a detailed and an in-depth review of the issue of violence against women containing general comments, comments on specific articles of the Convention and specific recommendations. For the

purpose of the present study those specific recommendations are particularly relevant that deal with protective and preventive measures, compensation and rehabilitation. The specific recommendations, inter alia, provide for:

(a) Appropriate protective and support services for victims (para. 24 (b));

(b) Preventive and rehabilitation measures (para. 24 (h));

(c) Effective complaints procedures and remedies, including compensation (para. 24 (i));

(d) Rehabilitation and counselling (para. 24 (k));

(e) Accessibility of services to victims living in isolated areas (para. 24 (o));

(f) Services to ensure the safety and security of victims and rehabilitation programmes (para. 24 (r));

(g) Effective legal measures, including compensatory provisions, preventive measures, protective measures (para. 24 (t)).

E. The Commission of Inquiry established under the Constitution of the International Labour Organisation

67. Since the Commission of Inquiry established in accordance with article 26, paragraph 4, of the Constitution of the International Labour Organisation (ILO) to examine the complaint concerning the observance by Romania of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), included a special chapter "Reparations", this report and especially the special chapter on reparations are very relevant to the present study and will therefore be reviewed in some detail. 45/

68. Before entering into the question of reparations, it is appropriate to underline the obligations Governments undertake to comply with their treaty obligations, which may also amount to, as the case may be, the granting of redress and reparation. 46/ In this respect the Commission of Inquiry referred to the meaning and scope of the obligation stated in article 19, paragraph 5 (d) of the ILO Constitution, under the terms of which members ratifying a Convention "will take such action as may be necessary to make effective the provision of such Convention". The Commission of Inquiry considered that legislation conforming to the requirements of Convention No. 111 should be fully and strictly enforced, which "implies the existence of effective administrative law enforcement services and, in particular, of measures enabling thorough inspection by officials who can act with complete independence. It also implies that the provisions of such legislation are brought to the attention of all persons concerned" and "that effective grievance procedures should guarantee the right to lodge complaints concerning infringements of the law, in conditions of independence and impartiality, without their having to fear reprisals of any kind". 47/ The Commission of Inquiry significantly added that where such "conditions are not

fully complied with, a Government cannot disclaim responsibility for actions or omissions on the part of its agents, or for the behaviour of employers or even of private individuals". 48/

Forms of reparations

69. The Commission of Inquiry reviewed the various reparation measures taken by the Romanian Government in so far as those measures were designed to remedy the consequences of discriminatory practices in areas covered by the Discrimination (Employment and Occupation) Convention. These measures include: amnesties, establishment of ad hoc committees to settle cases of persons claiming to have been wronged, adoption of regulations designed to remove discriminatory measures, re-examination of certain verdicts, compensation granted by the tribunals.

70. The amnesty measures granted by Legislative Decree No. 3 of 4 January 1990 covered political offences under the previous regime, notably actions in connection with the expression of opposition to the dictatorship and the personality cult, the terrorism and the abuse of power committed by those who held political power. The amnesty measures also covered actions committed in connection with respect for human rights and fundamental freedoms, with the demand for civil and political, economic, social and cultural rights, and the abolition of discriminatory practices.

71. Another measure of reparation was the creation in February 1990 of a specialized committee "to inquire into abuses and violations of basic human rights and to rehabilitate the victims of the dictatorship". During the three months of its proceedings, the committee received over 18,000 claims for reparation of human rights violations committed by the previous Government. It examined and settled between 4,000 and 5,000 cases. The Commission of Inquiry reported that according to a witness, "it has been impossible for the Committee to conduct its proceedings effectively, largely due to lack of personnel and the inordinate number of cases". Reference was also made "to a certain lack of cooperation on the part of those whose duty it was to help solve the cases". 49/

72. A third reparation measure was the adoption on 30 March 1990 of a Legislative Decree to grant rights to persons persecuted for political reasons by the dictatorship established on 6 March 1945. The persons covered by this decree and entitled to benefit from its provisions are employed or retired persons charged with political offences who have suffered from one of the following six circumstances:

(a) Deprivation of liberty, pronounced on the basis of a final decision of the court or on the basis of a detention order for offences of a political nature;

(b) Deprivation of liberty as a result of administrative measures or to serve the needs of an inquiry by the forces of repression;

(c) Psychiatric internment;

(d) House arrest;

(e) Forcible transfer from one place to another;

(f) First- or second-degree disability arising during or following any of the above five situations, and preventing the person from finding work.

73. The reparations provided for under the Legislative Decree are of three kinds: the taking into account of the duration of the persecution or its consequences in the calculation of seniority in employment; financial indemnities proportionate to the duration of the persecution; and entitlements in respect of medical care and housing accommodation. The machinery set up for the implementation of the Legislative Decree comprises committees established at county level and composed of government officials and representatives of the parties concerned, including the Association of Former Political Detainees and Victims of the Dictatorship. A national committee is responsible for the coherence of the entire procedure. The Commission of Inquiry reported that according to information received from the Romanian Government, in August 1990 around 9,300 reparations claims were registered, of which more than 5,400 had been settled. 50/

74. Other reparation measures pertained to the elimination of certain injustices in higher education, inherited from the period of the dictatorship. Students who had previously been excluded from higher education for political or religious reasons were reintegrated in their universities. Also, teachers who had been persecuted for political or religious reasons were reinstated and enjoyed their full rights. However, the Commission of Inquiry was not able to gather detailed information concerning the number of students and teachers reinstated in their right to pursue an education, without discrimination on the basis of political opinion or of religion. 51/

75. The Commission of Inquiry also examined actions taken in favour of national minorities. In accordance with section 16 of Act No. 18 of 19 February 1991 concerning land ownership, "Romanian citizens belonging to the German minority, who were either deported or transferred and dispossessed of their lands by a prescription enacted after 1944" shall, if they so request, be awarded priority in the allocation of land or receive a number of shares proportionate to the value of land to which they are entitled.

76. Finally, the Commission of Inquiry examined a number of special cases brought to its notice. The Commission received detailed information "concerning the situation of the workers in Brasov who, in November 1987, had demonstrated against the Government in power". The Brasov District Tribunal convicted, in December 1987, "61 workers for outrage to public decency and disturbance of the peace (hooliganism)". The majority of those convicted were "forcibly transferred to other areas, to more arduous and lower-paid jobs. Furthermore, these workers declared that they were ill-treated during their arrest and detention" and they feared "they were irradiated during their detention after being exposed to radioactive substances". On 23 February 1990, the Supreme Court of Justice reversed the penal sentence of the Brasov District Tribunal and the convicted persons were consequently acquitted. However, these persons concerned felt that this decision was not sufficient to do justice to their case. Through the "Association of 15th November 1987" a request was made to the authorities to

make good the financial losses the victims had suffered as a result of their conviction and transfer. In reply the Ministry of Labour awarded compensation to the victims on the basis of detailed calculations. 52/

Recommendations by the Commission of Inquiry

77. The Commission of Inquiry included in its report a series of recommendations which it listed in two categories: "essential premises" for the attainment of full compliance with the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and measures to be taken on the basis of these premises. Among the essential premises such fundamental issues were mentioned as the strengthening of the rule of law; the separation of the legislative, executive and judiciary powers; independent judiciary; equal access to justice; constitutional guarantee of the rights recognized for all persons by the Universal Declaration of Human Rights and the International Covenants; freedom of association and the right to bargain collectively; permanent structure for dialogue between management and trade unions; and - particularly relevant from the perspective of the present study - "that a competent body be entrusted with the task of receiving and settling some 14,000 complaints which remained pending after the dissolution of the Commission of the Provisional Council for National Unity to investigate abuses and infringements of fundamental human rights and to rehabilitate the victims of the dictatorship". 53/

78. The other category of recommendations included measures aiming at: putting an end to the effect of discriminatory measures in employment and restoring to the persons concerned equal opportunity and treatment which had been suspended or altered; guaranteeing an efficient and impartial follow-up to the request for medical examinations made by the persons who went on strike on 15 November 1987 in Brasov and who have been rehabilitated by the courts; reinstating the workers who, under the Labour Code provisions on imprisonment for over two months, lost their jobs as a result of being arrested following the June 1990 demonstrations and of not being released until after more than two months, despite the absence of evidence; assisting citizens wishing to rebuild their houses destroyed as a result of the systematization policy declared by the previous regime; informing the supervisory bodies of the International Labour Organisation of the results achieved as regards reparations for the discrimination suffered by members of national minorities or by persons persecuted for political reasons. 54/

Some comments

79. The chapter on reparations of the report of the Commission of Inquiry is highly instructive and useful for the purposes of the present study. First, it emphasizes the importance of procedural requirements and conditions, such as notification of all persons concerned, existence of effective grievance procedures, and conditions of impartiality and independence. Second, it highlights and recommends a variety of means of redress and reparations (referred to in paras. 77 and 78 above) which are designed to fulfil the requirements of justice and to meet the special and various needs of the victims. Third, it brings out that the right to reparation should be insisted

upon whenever systematic discrimination has been applied not only in the area of civil and political rights but also with respect to economic, social and cultural rights.

F. The European Court of Human Rights

80. Under article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights, when it finds that a violation of the Convention by a contracting State has taken place, may afford just satisfaction to the victim ("the injured party"), provided that the consequences of the violation cannot fully be repaired according to the internal law of the State concerned. In addition, in a more specific sense, article 5, paragraph 5, of the European Convention provides that everyone who has been the victim of arrest or detention in contravention of the provisions of the same article shall have an enforceable right to compensation.

81. The European Court has awarded "just satisfaction" (art. 50 of the Convention) of a pecuniary nature in far over 100 cases. The amounts awarded vary largely and represent compensation for damage (pecuniary and non-pecuniary) and/or reimbursement of costs and expenses (in particular lawyers' fees). The Court has never been called on as yet to rule on a case involving "gross" violations of human rights and fundamental freedoms. Consequently, for the purpose of the present study no detailed analysis of the case law in connection with article 50 of the European Convention is called for. However, it may be useful to provide some indications as to the interpretation of article 50. In this respect, particular reference will be made to one of the early judgements of the European Court relating to the question of the application of article 50, viz. the judgement of 10 March 1972 in the cases De Wilde, Ooms and Versijp (the so-called "Vagrancy" Cases). 55/

82. In the "Vagrancy" Cases the Belgian Government argued that the applicants' request for just satisfaction was inadmissible because the applicants had not exhausted their domestic remedies in accordance with article 26 of the Convention. In the Government's view this article applied not only to the original application, in which a violation of the substantive provision of the Convention was alleged, but also to any claim for compensation under article 50. The Court did not accept the Government's plea of inadmissibility. The Court argued, inter alia, that article 50 had its origin in certain clauses which appear in treaties of a classical type - such as, article 10 of the German-Swiss Treaty on Arbitration and Conciliation, 1921, and article 32 of the Geneva General Act for the Pacific Settlement of International Disputes, 1928 - and have no connection with the rule of exhaustion of domestic remedies. Most significantly the Court added:

> "... if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of human rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention." 56/

It is apparent that the Court attaches great importance to the requirements of expeditiousness and effectiveness in matters concerning awards of just satisfaction.

83. As regards the merits of the same case, the Belgian Government argued that the internal law of Belgium enabled the national courts to order the State to make reparation for damage caused by an illegal situation for which it was responsible, whether this situation constituted a breach of rules of internal law or of rules of international law. The Court did not accept this view. The Court said that the treaties from which article 50 was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precludes this being done. The Court added:

> "Nevertheless, the provisions of Article 50 which recognise the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of restitutio in integrum follows from the very nature of the injury; indeed common sense suggests that this must be so a fortiori." 57/

84. In the same case the various requirements were reviewed for the affording of "just satisfaction" in the application of article 50, to the effect that:

(a) The Court has found "a decision or measure taken" by an authority of a contracting State to be "in conflict with the obligations arising from the ... Convention";

(b) There is an "injured party";

(c) The Court considers it "necessary" to afford just compensation. 58/

While the Court held that it had jurisdiction to award compensation, it declared in this case that the applicants' claims were not well founded. In this connection it is evident that the wording of article 50 gives the Court a good deal of latitude as regards its competence whether to award compensation and to what amount. The Court said so itself when it observed:

> "as is borne out by the adjective 'just' and the phrase 'if necessary' the Court enjoys a certain discretion in the exercise of the power conferred by article 50". 59/

85. In conclusion, it may be observed that four basic conditions must be fulfilled for affording just satisfaction to the injured party under article 50 of the European Convention: (i) a breach by a State party of its obligations under the Convention; (ii) the absence of the possibility of a complete reparation (restitutio in integrum) on the part of that State party; (iii) the existence of material and/or moral damage; (iv) a causal link between the breach of the Convention and the existence of damage. 60/

In addition to these substantive conditions, particular weight should be given, as noted above, to the procedural requirements of expeditiousness and effectiveness. In many cases, however, the Court held that a favourable decision on the merits constituted in itself "just satisfaction to the injured party" and that a further award of compensation was not called for. 61/

86. In a number of cases Governments have also made payments, by way of compensation, as part of a friendly settlement reached in accordance with article 28 (b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. A special role in this regard is given to the European Commission of Human Rights which shall not only place itself at the disposal of the parties concerned with a view to securing the settlement but which should also see to it that, as article 28 (b) puts it, the settlement is achieved "on the basis of respect for Human Rights as defined in this Convention". In practice this requirement should imply that the settlement is not merely a trade-off between the parties but that the Government concerned will also redress the causes of the violations which may have occurred and take the necessary measures to prevent the re-occurrence of such violations. The European Commission of Human Rights, acting in the public interest for the defence of human rights, has in this regard an important supervisory duty to uphold the principles of the Convention. Any compensation or award granted to an injured party must not only be just towards that party itself but also do justice to the purposes and principles of the human rights protection system.

G. The Inter-American Court of Human Rights

87. The Inter-American Court has been seized with a number of cases involving disappearances attributed to the armed and security forces in Honduras. 62/ The Court reached decisions in the Velásquez Rodriguez case, 63/ the Godinez Cruz case, 64/ and the Fairén Garbi and Solis Corrales case. 65/ In view of the similarity of these cases, reference will only be made to the Velásquez case, for practical purposes. Given the nature of this progress report, three aspects will be singled out as deserving special attention. First, the obligation to pay compensation in relation to the obligation to prevent, to investigate and to punish; second, the establishment of compensatory damages; third, the issue of follow-up and monitoring.

88. It should be noted that the Inter-American Court interprets the obligation contained in article 1 of the American Convention on Human Rights to the effect that States parties undertake to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms recognized in the Convention, in a comprehensive manner. The Court stated that:

> "As a consequence of this obligation, the States must prevent, investigate and punish any violations of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations." 66/

In the same vein the Court ruled:

> "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation." 67/

In the Court's approach, which is very similar to the approach of the Human Rights Committee, as discussed above, the obligation to prevent and the obligation to restore are closely interlinked. Moreover, it is clear that the preventive approach should receive due priority and emphasis because an ounce of prevention is more effective than a pound of cure. It is also worth noting that among the means of redress the Court mentions in a subsequent order are the investigation of the violations committed, the punishment of the guilty and the provision of adequate compensation. In other words, redress means that full justice should be done vis-à-vis society as a whole, the persons responsible and the victims. Compensatory measures form part of a policy of justice.

89. In its judgement of 29 July 1988 the Inter-American Court decided, taking into account article 63 (1) of the American Convention, that the State party concerned was required to pay fair compensation to the next-of-kin of the victim and that the form and amount of such compensation, failing agreement within six months of the date of the judgement, was to be settled by the Court and that, for that purpose, the Court retained jurisdiction of the case. Consequently, the Court became again seized with the matter and on 21 July 1989 delivered a judgement on compensatory damages in the Velásquez Rodriguez case. 68/ In this judgement the Court defined the scope and content of the just compensation to be paid to the family of the disappeared person.

90. The Court made it clear that as a principle of international law every violation of an international obligation which results in harm creates a duty to make adequate reparation. In this respect the Court ruled that reparation "consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm". 69/ As to emotional harm, the Court held that indemnity be awarded under international law (i.e. the American Convention on Human Rights) and that indemnification must be based upon principles of equity. In this context the Court referred to the applicable provision of the American Convention (art. 63 (1)), which according to the Court "is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it". 70/

91. As regards the scope of the reparation the Court observed that such measures as investigation into the facts, the punishment of those responsible, a public statement condemning the practice of involuntary disappearances and in fact the judgement of the Court itself on the merits constituted a part of reparation and moral satisfaction of significance and importance for the families of the victims. On the other hand, contrary to what had been requested by the lawyers of the victims, the Court held that punitive

damages were not included in the expression "fair compensation", used in article 61 (1) of the American Convention. This expression referred, according to the Court, to a part of the reparation and to the "injured party" and is therefore compensatory and not punitive. As a result, the Court concluded that fair compensation included reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of the victim. 71/ It should further be noted that the Court also gave ample consideration to the question of moral damages and found that the disappearance of the victim produced harmful psychological impacts among his immediate family which should be indemnified as moral damages. 72/

92. Finally, as regards the monitoring of follow-up action, which was discussed earlier in connection with the views of the Human Rights Committee under the Optional Protocol (see paras. 55 and 59 above), it is obvious that the same arguments underlining the need for follow-up supervision apply a fortiori to binding judgements of the Court. It should therefore be duly noted that the Inter-American Court in its Velásquez compensation judgement decided in the final sentence of the award that it should supervise the indemnification ordered and should close the file only when the compensation had been paid.

V. COMPENSATION TO VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS RESULTING FROM THE UNLAWFUL INVASION AND OCCUPATION OF KUWAIT BY IRAQ

93. In resolution 687 (1991) adopted by the Security Council on 3 April 1991 the Council reaffirmed that Iraq "... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" (para. 16). In this connection the Council decided to create a fund to pay claims that fall within paragraph 16 quoted above and to establish a Commission that will administer the fund. It should be noted that the Council's wording in paragraph 16 of resolution 687 (1991) by and large restated paragraph 8 of Council resolution 674 (1990), which reminded Iraq that "... under international law, it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq".

94. For the purpose of the present study three issues will be discussed: (a) the legal basis for Iraq's duty to pay compensation; (b) loss, damage or injury suffered in connection with gross violations of human rights; (c) Governments and individuals as subjects submitting claims. 73/

A. The legal basis for Iraq's duty to pay compensation

95. In sections II and III of this study the obligation to grant compensation under international law was reviewed in the light of principles and rules of humanitarian law, norms of international human rights law and the law of State responsibility which is the subject of a comprehensive study of the International Law Commission. When the Security Council reaffirmed Iraq's liability under international law for any direct loss, damage or injury, the Council did not have in mind the loss, damage or injury which Iraq inflicted upon its own nationals as a result of large-scale practices of gross violations of human rights and which was the subject of a mandate entrusted to a Special Rapporteur pursuant to resolution 1991/74 of the Commission on Human Rights (E/CN.4/1992/31). The Security Council, basing itself on traditional concepts of international law and having primarily in mind the interests of reparation in the inter-State context, referred to loss, damage or injury caused by Iraq to foreign Governments, nationals and corporations. From this perspective it was quite natural and appropriate that the Special Rapporteur who studied the situation of human rights in Kuwait under Iraqi occupation, appointed pursuant to resolution 1991/67 of the Commission on Human Rights, paid due attention in his report to issues relating to responsibility and compensation (E/CN.4/1992/26, paras. 249-261).

96. It should be recalled, as did the Special Rapporteur on the situation of human rights in Kuwait under Iraqi occupation, that according to a well-established principle of international law, there is "an internationally wrongful act of a State when: (a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State". (Art. 3 of the International Law Commission's draft articles on State responsibility,

Part One, doc. A/CN.4/SER.A/1975/Add.1.) Furthermore, in the area of international humanitarian law, reference must be made to the common provision in the four Geneva Conventions of 1949 (art. 51 of the First Convention, art. 52 of the Second Convention, art. 131 of the Third Convention and art. 148 of the Fourth Convention) to the effect that no State shall be allowed to absolve itself or any other State of any liability incurred by itself or by another State with respect to grave breaches listed in the Geneva Conventions. "Grave breaches" are, according to the wording of article 147 of the Fourth Geneva Convention, "those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

97. In addition, common article 3 of the Geneva Conventions, which was included in the Geneva Conventions as a standard of protection in relation to armed conflicts not of an international character, must be considered as a minimum yardstick of customary international law applicable to all types of armed conflicts and thus relevant in the present legal context. Consequently, each State and any other entity involved in an armed conflict shall be bound to apply, as a minimum, the following provisions:

> "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

B. Loss, damage or injury suffered in connection with gross violations of human rights

98. One of the first tasks of the Governing Council of the United Nations Compensation Commission (UNCC), established pursuant to paragraph 18 of Security Council resolution 687 (1991) to administer the fund to pay compensation for claims, was the drawing up of criteria for the processing of urgent claims (S/AC.26/1991/1). These criteria were later supplemented in

successive decisions taken by the Governing Council of the UNCC (S/AC.26/1991/2-7). According to the Commission's criteria, "claims must be for death, personal injury or other direct loss to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage-taking or other illegal detention" (S/AC.26/1991/1, para. 18).

99. In a decision taken by the Governing Council of UNCC during its second session, held on 18 October 1991, the Governing Council adopted formulations on the notions of serious personal injury and mental pain and anguish, for the purpose of the application of the criteria (S/AC.26/1991/3). With respect to serious personal injury the Governing Council decided that this notion "means:

(a) Dismemberment;

(b) Permanent or temporary significant disfigurement, such as substantial change in one's outward appearance;

(c) Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;

(d) Any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery".

100. "For purposes of recovery before the Compensation Commission, 'serious personal injury' also includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained. 'Serious personal injury' does not include the following: bruises, simple strains and sprains, minor burns, cuts and wounds; or other irritations not requiring a course of medical treatment."

101. As regards mental pain and anguish, the following was stated:

"Compensation will be provided for pecuniary losses (including losses of income and medical expenses) resulting from mental pain and anguish. In addition, compensation will be provided for non-pecuniary injuries resulting from such mental pain and anguish as follows:

(a) A spouse, child or parent of the individual suffered death;

(b) The individual suffered serious personal injury involving dismemberment, permanent or temporary significant disfigurement, or permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;

(c) The individual suffered a sexual assault or aggravated assault or torture."

102. It should also be noted that the Governing Council of the UNCC decided at its sixth session on 26 June 1992 that members of the Allied Coalition Armed Forces were not eligible for compensation as a consequence of their involvement in coalition military operations against Iraq unless: (a) compensation is awarded in accordance with criteria already adopted by the Council; (b) the claimants are prisoners of war; and (c) the loss or injury resulted from mistreatment in violation of international humanitarian law (S/AC.26/1992/11).

C. Governments and individuals as subjects submitting claims

103. Initially, according to the criteria for the processing of urgent claims, the submission of claims was a right mainly reserved to Governments. As the criteria stated, "each Government will normally submit claims on behalf of its nationals; each Government may, in its discretion, also submit the claims of other persons resident in its territory" (S/AC.26/1991/1, para. 19). However, the Governing Council of the Compensation Fund "may request an appropriate person, authority or body to submit claims on behalf of persons who are not in a position to have their claims submitted by a Government". This solution was apparently not a satisfactory one and the Governing Council of the Compensation Fund felt the need to develop further guidelines on this point. In a decision taken during its second session on 18 October 1991 containing these further guidelines (S/AC.26/1991/5), the Governing Council stated that "a high number of individuals will most likely not be in a position to have their claims submitted by a Government. Among these individuals Palestinians represent the most numerous group. Furthermore, stateless persons and other individuals in the same position who still remain in Kuwait or who are situated on border lines are also to be included in this category".

104. Consequently, in order to meet the needs of those persons not represented by Governments and to fulfil their claims, the United Nations Compensation Commission considered it necessary that an appropriate person, authority or body be appointed to submit claims on behalf of those persons. Aware of the magnitude of the task to be entrusted to such person, authority or body,

the latter should, according to Governing Council of the Compensation Commission, seek advice and any appropriate cooperation from established and experienced international bodies, such as UNRWA, UNHCR and the ICRC.

D. Some comments

105. The arrangements made with regard to compensation to victims of gross violations of human rights and fundamental freedoms resulting from the unlawful invasion and occupation of Kuwait by Iraq have a strong political and legal basis in a Security Council resolution and benefit from the authority of the Security Council. It is in the nature of the task and the mandate of the Security Council that the creation of the Compensation Fund and the criteria for the processing of claims are governed by State interests. The legal framework is set out in the law relating to reparation claims on the part of foreign subjects rather than in modern international human rights law. Nevertheless, significant trends and elements can be discerned as relevant in the overall context of the present study. For instance, the statement by the Governing Council of the UNCC that for purposes of recovery before the Compensation Commission, the notion "serious personal injury" includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal occupation for more than three days, may provide helpful guidance in developing criteria concerning the right to reparation for victims of gross violations of human rights. The same applies to the scope and content given to "mental pain and anguish" and to the consequential pecuniary losses and non-pecuniary injuries resulting from such mental pain and anguish. Finally, in the light of the progressive development of international human rights law and the granting of locus standi to individuals before international forums, it is of eminent importance that injured persons may present their claims on their own behalf and do not have to rely on the goodwill of Governments. This is an a fortiori consideration and a pressing requirement of justice in the case of stateless persons and other individuals who have no Government to act on their behalf. This issue was brought out quite clearly in the practice of UNCC and one cannot but agree with the Special Rapporteur on the situation of human rights in Kuwait under Iraqi occupation, that compensation should be granted to victims of human rights violations regardless of their nationality and their present status in Kuwait (E/CN.4/1992/26, para. 261).

VI. NATIONAL LAW AND PRACTICE

106. It has not been possible to collect elaborate information on national law and practice relating to the right to reparation for victims of gross violations of human rights and fundamental freedoms. A request to Governments to supply relevant information provoked only scarce reactions. Consequently, the Special Rapporteur had to rely mainly on information received from other sources 74/ and pertaining to a limited number of countries. This section on national law and practice is included for illustrative purposes in order to show how some countries which went through a period of gross violations of human rights have been trying to repair the wrongs of the past and to set norms for the future. While the information reviewed in this section is not complete enough for drawing general conclusions, it does allow the making of certain observations by way of illustration.

107. The most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress of wrongs suffered is provided by the Federal Republic of Germany to the victims of Nazi persecution. The early laws enacted in Germany after the Second World War dealt only with restitution of, or compensation for, identifiable property. 75/ More far-reaching were the successive Compensation Laws and Agreements, enacted and concluded from the year 1948 and onwards till the enactment in 1965 of the Final Federal Compensation Law (Bundesentschädigungsschlussgesetz, to be referred to as BEG).

108. Under the BEG, a victim of the Nazi persecution is defined as someone who was oppressed because of political opposition to National Socialism, or because of race, religion or ideology, and who suffered in consequence loss of life, damage to limb or health, loss of liberty, property or possessions, or harm to professional or economic prospects. 76/ An important aspect of the criteria for eligibility under the BEG is the law's principle of territoriality. A claim for compensation is tied to the claimant's residence in Germany but the law does not only cover residents of the Federal Republic of Germany and former residents of the former territory of Germany as in 1937, but also various categories of refugees, emigrants, deported or expelled people if they had for some time domicile or place of permanent sojourn in Germany. 77/

109. As regards various categories of damage covered by the BEG, the following may be noted:

(a) Loss of life included, according to the interpretation of the courts, homicide, manslaughter and death as a result of damage to health inflicted on the victim, notably also in concentration camps. Loss of life also included death caused by a deterioration in health resulting from emigration or from living conditions detrimental to health. In addition, compensation has been paid in cases of suicide prompted by persecution, including suicide caused by economic difficulties which the victim could not overcome in the country to which he emigrated; 78/

(b) Damage to limb or health gave rise to compensation if the damage was more than insignificant which means that it entailed or was likely to entail lasting impairment of the victim's mental or physical faculties; 79/

(c) Damage to liberty included deprivation of liberty and restrictions of liberty. Under deprivation of liberty falls police or military detention, arrest by the National Socialist Party, custodial or penal imprisonment, detention in a concentration camp and forced stay in a ghetto. The victim is also regarded as having been deprived of liberty if he lived or did forced labour under conditions resembling detention. Restrictions of liberty giving a claim to compensation included compulsion to wear the Star of David and to live "underground" under conditions unfit for a human being; 80/

(d) Damage to professional and economic prospects led to compensation if the victim had lost use of his earning power. 81/

110. Many victims of Nazi persecution did not suit the requirements of the BEG. Among these victims were Belgian, Danish, Dutch and French nationals who were persecuted and damaged in their own countries. To meet these claims, a number of countries (Luxembourg, Norway, Denmark, Greece, Netherlands, France, Belgium, Italy, Switzerland, Austria, United Kingdom, Sweden) concluded with the Federal Republic of Germany in the years 1959-1961 with the Federal Republic of Germany "global agreements" under which they received funds for payment to individual claimants. 82/ Earlier, in 1952, the Federal Republic of Germany and Israel had concluded an agreement under which the Federal Republic undertook to pay Israel compensation to assist in the integration of uprooted and destitute refugees from Germany and to pay restitution and indemnification for claims of individuals, Jewish organizations and for the rehabilitation of Jewish victims of the Nazi persecution. 83/

111. While the overall assessment of the BEG is positive (see infra, para. 125), the law did have its inadequacies and decisions based on the law showed shortcomings. For instance, many observers maintained that damage to property and possessions received too favourable consideration in comparison with the less generous treatment of damage to life and health. Similarly, the principle of territoriality worked to the disadvantage of victims who were not residents of Germany or who were stateless persons or refugees. On the other hand, one group of victims had been clearly favoured. They were former members of the German civil service or the German Government, including judges, professors and teachers, who were reinstated in the position, salary or pension group which the claimant would have reached had the persecution not taken place. 84/ It is against this background that in a set of principles and guidelines for national compensation policies, formulated on the basis of the experience gained by the German Wiedergutmachung, the first two principles and guidelines read as follows:

(i) The principle of equality of rights of all victims is of primary importance. This does not mean that they should all receive the same amount of relief, but it does mean that they should enjoy the same rights within the scope of the claims laid down by the law;

(ii) It is necessary to have central planning, legislative, and administrative machinery, since only the principle of centrality can ensure the principle of equality of rights. 85/

112. In Poland, Parliament adopted on 23 February 1991 the law concerning the reversion of judgements passed in the period from 1 January 1944 to 31 December 1956 (the so-called Stalinist period) for activities in favour of the independence of the Polish State. 86/ Reversion of judgement can be considered as a form of rehabilitation of gross violations of human rights by the judiciary. However, reversion of judgement by the court does not automatically entail measures of compensation. For that purpose a separate application is necessary and must be submitted within a year after the reversion.

113. While the moral value of the Polish law on the reversion of judgements is without doubt, it has been observed that the law is only of a limited scope. 87/ First of all, ratione temporis the law covers only the period up to 31 December 1956 and does not allow for reparation of damages to victims of human rights violations which occurred after 1956. Another serious limitation ratione materiae is that the law does not cover violations of human rights committed by administrative organs or by the police, for instance death or torture inflicted during interrogation. Also, no law exists that provides for punishment of perpetrators of human rights violations between 1945 and 1956.

114. After the military dictatorship in Chile which lasted from 11 September 1973 to 11 March 1990, the new democratic Government established by Supreme Decree on 25 April 1990 the National Commission for Truth and Reconciliation. 88/ The powers of the National Commission related to the investigation of serious violations of human rights perpetrated in Chile during the period of the military dictatorship. Serious violations of human rights were understood to mean violations of the right to life: disappearances, summary and extrajudicial executions, torture followed by death, as well as unsolved kidnappings and deaths of persons inflicted by private persons on political pretexts. As was correctly observed, the establishment of the National Commission and its subsequent activities constituted by themselves a first measure of redress, by giving partial satisfaction to the relatives of the victims as regards their wish to know the circumstances in which their relatives were killed or made to disappear. 89/ The National Commission envisaged three categories of reparation: first, symbolic reparation to vindicate the victims; second, legal and administrative measures to solve several problems relating to the acknowledgement of death (family status, inheritance, legal representation for minors); third, compensation including social benefits, health care, education.

115. In the light of the report of the National Commission for Truth and Reconciliation, the Law 19.123 of 31 January 1992 was approved, creating the National Corporation for Reparation and Reconciliation for a period of two years to coordinate, implement and promote the actions necessary for complying with the recommendations contained in the report of the National Commission. One of the principal tasks of the Corporation is to promote and cooperate in actions with a view to determining the whereabouts of those who disappeared after arrest and whose bodies have not been found, although they have been legally recognized as dead (art. 2, para. 2). Another important

task of the Corporation is to investigate cases in which the National Commission was not able to affirm that there were victims of human rights violations as well as other cases not dealt with by the National Commission (art. 2, para. 4). It should also be noted that the National Corporation is not empowered to carry out judicial powers which belong to the courts of law and therefore that it shall not rule on the criminal responsibility of individuals. Relevant information of that nature should be sent to the courts of law (art. 4).

116. Law No. 19.123 provides for "reparation pension", which is a monthly allowance for the benefit of relatives of the victims of human rights violations or political violence identified in the report of the National Commission and those recognized as victims by the Corporation itself (arts. 17 and 18). Entitled to request the reparation pension are the surviving spouse, the mother (or the father in the mother's absence) and children under 25 years of age or handicapped children of any age (art. 20). Other forms of compensation are medical benefits (art. 28) and education benefits (arts. 29-31).

117. It can be noted that Chile has laid much emphasis on revealing the truth as regards the most serious violations of human rights pertaining to the right to life. Reparation was and is focused mainly on the vindication of the victims of these serious violations and on the compensation of their relatives. At the same time it should be noted that the reparation measures in Chile do not cover other serious violations of human rights and that it remains unclear whether and to what extent those responsible for the crimes committed during the military dictatorship will be brought to justice. 90/ An informed observer commented on the reparation efforts in Chile that the report of the National Commission for Truth and Reconciliation was "a major improvement on its forerunners in other countries, in scope, in depth and in political daring. Even if the implementation of its recommendations falls behind expectations, the report would remain as a unique standard, having implications wider than that of the Chilean context." 91/

118. In Argentina the Law No. 24.043 was promulgated on 23 December 1991. It provides for an indemnification from the State, payable in six instalments, to persons who, at the time that the state of siege was in force, were placed at the disposal of the National Executive or, who, as civilians, suffered detention by virtue of acts of military tribunals. 92/ The indemnification amounts to one thirtieth of the monthly remuneration assigned to the highest category on the wage scale for civilian personnel employed in the national public administration for each day in detention. The law is implemented under the authority of the Human Rights Office of the Ministry of the Interior - with the cooperation of the human rights organizations - and it stipulated renunciation of any other type of reparation.

119. While Law No. 24.043 was adopted to repair damage and injuries suffered by unlawfully detained persons, there are various reasons why the law has been of no avail to many victims (and their relatives) of abduction and forced disappearances and torture suffered by them. First, the military Government ruling the country from November 1974 to December 1983 has refused to

acknowledge the abductions and the new Government, after restoration of democracy, has not demanded of the armed forces a full disclosure of the facts relating to the disappeared persons. Second is the difficulty of proving the responsibility of State agents for the abductions, given the clandestine system employed by the military Government. Third is the reluctance on the part of the relatives of the persons detained/disappeared to claim financial compensation, which they would consider a buy-off as long as their primary demand, to learn the truth about the fate of the persons detained/disappeared, has not been fulfilled. 93/

120. In a note verbale of 20 May 1992 addressed to the United Nations Working Group on Enforced or Involuntary Disappearances, the Argentine Government drew the attention of the Working Group to a ruling of a Federal Court of Appeal in the case of a Swedish national who was abducted and disappeared in Argentina in 1977. The Court decided, taking into account the special circumstances of the case, to grant compensation to the victim's father in view of the moral damage caused to him by his daughter's abduction and disappearance. 94/

121. It should further be noted that the Inter-American Commission on Human Rights was instrumental in concluding a friendly settlement in the cases of 13 persons who had filed petitions with the Commission denouncing serious violations of human rights during the military regime that ruled Argentina between 1976 and 1983 (report No. 1/93 of the Inter-American Commission on Human Rights, approved on 3 March 1993). The violations consisted in arbitrary detentions under the decree law known as the "National Executive Power" which had permitted the incarceration of persons for indefinite periods without trial. The petitioners based themselves on articles 8 and 25 of the American Convention on Human Rights and on the judgement of the Inter-American Court in the Velásquez Rodriguez case. Pursuant to the governmental decree No. 70/91 of 10 January 1991 which was later confirmed by the Law No. 24.043, referred to in paragraph 118 above, the compensation awarded amounted to one thirtieth of the monthly salary on the highest wage scale for civilian personnel employed in the national public administration for each day of illegal detention. With respect to those persons who died while in detention an additional amount of compensation was awarded which was equivalent to indemnification for five years in detention. In the case of persons who had suffered serious injuries, the compensation award for illegal detention was augmented by an amount equal to 70 per cent of the compensation which family members of a deceased person would receive. In a relevant press communiqué (No. 5/93, dated 10 March 1993) the Inter-American Commission pointed out that this was the first time that a friendly settlement had been successfully concluded and it expressed that hope that the precedent would inspire more frequent use of this procedure "for the sake of those persons whose human rights have been violated in the hemisphere".

122. In Uganda, in the aftermath of the dictatorship of President Idi Amin Dada, the Government enacted the President's War Veterans, Widows and Orphans Charity Fund Act (No. 2 of 1982) on behalf of victims (and their relatives) who had participated in liberation efforts against the dictatorship, and the Expropriated Properties Act (No. 9 of 1982) under which the expelled Asians were authorized to return to Uganda and reclaim their properties. 95/

However, in Uganda various limitations on claims for compensation apply. Thus, claims for the recovery of land may not be brought after 12 years and claims relating to ordinary torts may not be brought after 3 years following the origin of the claims. In 1986 the National Resistance Government (NRM) re-enacted in a Legal Notice (No. 6 of 1986) the statutory immunity precluding the institution of claims against the Government in respect of assaults, loss of life, arrest and detention, seizure, use, destruction or damage to property which may have been perpetrated by agents of Government prior to the NRM's assumption of power in Uganda in 1986. When Legal Notice No. 6 of 1986 was challenged as unconstitutional before the Uganda High Court, the Court struck down the statutory immunity. Thereupon, the Government promptly passed Decree No. 1 of 1987 by which the legal provisions of the statutory immunity were reinstated. 96/

123. A commentator on the Uganda situation observed that many victims of violations of human rights in Uganda do not have an effective remedy. 97/ There are many reasons for this, among them the absence in the legal system of a specific indication of concrete categories of violations of human rights, the ignorance of law and basic human rights on the part of many victims, the difficulties encountered in access to the courts, the application of the statutory period of limitation as well as the statutory immunity provision, the narrow interpretation of the common law of vicarious liability for acts by State agents, as well as the non-ratification by Uganda of the International Covenant on Civil and Political Rights and the Optional Protocol thereto.

Some comments

124. The above review of national law and practice of a limited number of countries relating to reparation to victims of gross violations of human rights presents a mixed picture. A common trend in this review is the wish of the nations concerned to disassociate themselves from the serious assaults on human dignity perpetrated under previous regimes and to undertake responsibility for providing redress of the wrongs committed and reparation to the victims. At the same time national law and practice also show some fundamental shortcomings because of the limited scope of the measures taken. It appears that large categories of victims of gross violations of human rights, as a result of the actual contents of national laws or because of the manner in which these laws are applied, fail to receive the reparation which is due to them. Limitations in time, including the application of statutory limitations; restrictions in the definition of the scope and nature of the violations; the failure on the part of authorities to acknowledge certain types of serious violations; the operation of amnesty laws; the restrictive attitude of courts; the incapability of certain groups of victims to present and to pursue their claims; lack of economic and financial resources: the consequence of all these factors, individually and jointly, is that the principles of equality of rights and due reparation of all victims are not implemented. This deficiency is not only apparent within the national context, it is even more glaring in the global context where millions of victims of gross violations of human rights are still deprived of any remedial or reparational rights and perspectives.

125. It should also be recalled that to this date the most comprehensive system of reparation was introduced by the Federal Republic of Germany for compensating victims of Nazi persecution. As was correctly observed more than 20 years ago in an enlightening overview of this important precedent: "... the payments have meant (for numerous victims) the difference between abject poverty and a dignified life with modest security. This does not mean that complete or even genuine restitution has been made. The persecutions by the Nazi regime were unparalleled and unique in their scope and inhumanity. They cannot be atoned and cannot be forgotten. However, from an historical and legal point of view, the compensation programme and reparations constitute a unique operation." 98/

VII. THE ISSUE OF IMPUNITY IN RELATION TO THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS

126. Any study of questions relating to the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms is bound to face the issue of impunity. This study will not analyse in depth the issue of impunity because it is the subject of a special study by Mr. Guissé and Mr. Joinet, Special Rapporteurs of the Sub-Commission (resolution 1993/43 of the Commission on Human Rights). However, for present purposes it cannot be ignored that a clear nexus exists between the impunity of perpetrators of gross violations of human rights and the failure to provide just and adequate reparation to the victims and their families or dependants.

127. In many situations where impunity has been sanctioned by the law or where de facto impunity prevails with regard to persons responsible for gross violations of human rights, the victims are effectively barred from seeking and receiving redress and reparation. In fact, once the State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate reparation.

128. Legal bodies such as the Human Rights Committee and the Inter-American Commission and the Inter-American Court of Human Rights, whose task it is to see to it that States parties to human rights treaties comply with their obligations under these human rights instruments, have set out a coherent and consistent line prescribing the measures that have to be taken to remedy violations of human rights. This coherent and consistent line of action includes the investigation of the facts, the bringing to justice persons found to be responsible, and ensuring reparation to the victims (see Sect. V, para. 56 above). In its General Comment 20 approved by the Human Rights Committee at its forty-fourth session in 1992 relating to the prohibition of torture, the Committee stated that amnesties in respect of acts of torture are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. The Committee added in the same comment that States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible. 99/ In particular the Velásquez Rodriguez judgement (see Sect. V, paras. 87-92 above), a landmark decision of the Inter-American Court of Human Rights, confirmed the same position. The Inter-American Commission on Human Rights relied heavily on this judgement when it concluded in the cases of eight petitioners that Uruguay's 1986 amnesty law, the Ley de Caducidad, which grants impunity to officials who had violated human rights during the period of military rule, is in breach of articles 1, 8 and 25 of the American Convention on Human Rights.

129. The Inter-American Commission noted in its report No. 29/92, dated 2 October 1992 that the country concerned, by adopting and applying the Ley de Caducidad, had not undertaken any official investigation to establish the truth about past events. The Commission reiterated the Court's view in the Velásquez Rodriguez case that a State's failure to investigate or to investigate in a serious manner with the consequence that the violation

remains unpunished and the victim uncompensated, violated the State's undertaking to ensure the full and free exercise of the affected rights. The Inter-American Commission concluded by recommending to the Government concerned that it pay the petitioners just compensation for their violated rights. In a separate report No. 28/92, also dated 2 October 1992, the Inter-American Commission found that Argentina's "Due Obedience" and "Final Stop" laws, as well as Presidential Pardon No. 1002, violated the American Convention. While factually not the same as the Uruguayan cases, the Commission applied essentially the same legal reasoning as it did with regard to the Uruguayan cases. 100/ The International Commission of Jurists concluded that the people in the countries concerned have a right to have the truth made public; to have the perpetrators of human rights violations tried and punished; and for the victims and/or their families to be compensated for the suffering they have endured as a result of the crimes committed by agents of the State. 101/

130. It is also relevant to recall that the United Nations Working Group on Enforced or Involuntary Disappearances has taken a strong position against impunity. It stated that perhaps the single most important factor contributing to the phenomenon of disappearances is that of impunity. Perpetrators of human rights violations, whether civilian or military, become all the more irresponsible if they are not held to account before a court of law. The Working Group further argued that impunity could also induce victims of those practices to resort to a form of self-help and take the law into their own hands, which in turn exacerbates the spiral of violence (E/CN.4/1990/13, paras. 18-24 and 344-347). It may therefore be concluded that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.

VIII. FINAL REMARKS; CONCLUSIONS AND RECOMMENDATIONS

131. It is obvious that gross violations of human rights and fundamental freedoms, particularly when they have been committed on a massive scale, are by their nature irreparable. In such instances any remedy or redress stands in no proportional relationship to the grave injury inflicted upon the victims. It is nevertheless an imperative norm of justice that the responsibility of the perpetrators be clearly established and that the rights of the victims be sustained to the fullest possible extent.

132. It is clear from the present study that only scarce or marginal attention is given to the issue of redress and reparation to the victims. The disregard of the rights of the victims is also pointed out by United Nations rapporteurs and working groups that deal with consistent patterns of gross violations of human rights. For example, the Special Rapporteur on extrajudicial, summary or arbitrary executions recently stated that with regard to compensation granted to the families of victims of extrajudicial, summary or arbitrary executions, only one Government had reported to him that indemnification was being provided to the families. 102/

133. In spite of the existence of relevant international standards to that effect (see Sect. II above), the perspective of the victim is often overlooked. It appears that many authorities consider this perspective a complication, an inconvenience and a marginal phenomenon. Therefore, it cannot be stressed enough that more systematic attention has to be given, at national and international levels, to the implementation of the right to reparation for victims of gross violations of human rights. In the United Nations this requirement can be met in standard-setting work, in studies, in reporting, in relief and redress procedures and in practical action such as those designed by the United Nations Voluntary Fund for Victims of Torture and the Voluntary Trust Fund on Contemporary Forms of Slavery.

134. It should always be kept in mind that many victims and their relatives and friends insist on the revelation of truth as the first requirement of justice. In this respect it is fitting to quote from a thoughtful lecture given by a personality who served as a member of the Chilean National Commission on Truth and Conciliation:

> "Truth was considered an absolute, unrenounceable value for many reasons. To provide for measures of reparation and prevention, it must be clearly known what should be repaired and prevented. Further, society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably, the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turn depends largely on a shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring." 103/

135. It is sometimes contended that as a result of passage of time the need for reparations is outdated and therefore no longer pertinent. As is borne out in this study, the application of statutory limitations often deprives

victims of gross violations of human rights of the reparations that are due to them. The principle should prevail that claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations. 104/ In this connection, it should be taken into account that the effects of gross violations of human rights are linked to the most serious crimes to which, according to authoritative legal opinion, statutory limitations shall not apply. Moreover, it is well established that for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time.

136. The Special Rapporteur hereby submits the following conclusions and recommendations.

General

1. The question of reparation for victims of gross violations of human rights and fundamental freedoms has received insufficient attention and should be addressed more consistently and more thoroughly both in the United Nations and other international organizations, as well as at the national level.

2. The question of reparation should be viewed in the overall context of the promotion and protection of human rights and fundamental freedoms and of preventing and correcting human rights abuses.

3. In dealing with the question of reparation, due regard should be given to the experiences gained in various countries that have passed through a period of gross human rights violations.

United Nations and other intergovernmental organizations

4. It is recommended that the United Nations, during the current Decade of International Law, give priority attention to adopting a set of principles and guidelines that give content to the right to reparation for victims of gross violations of human rights. The proposed basic principles and guidelines included in the present study (see Sect. IX) could usefully serve as a basis for such an undertaking.

5. It is also recommended that, where appropriate, new instruments on human rights include provisions on reparations and that consideration be given to amending existing instruments in this regard.

6. All agencies and mechanisms dealing with human rights and humanitarian issues at national and international levels should be mindful of the perspective of victims, and of the fact that victims often suffer long-term consequences of the wrongs inflicted on them.

7. International treaty bodies that monitor the observance and realization of human rights should, in carrying out their work, pay systematic and due attention to the question of reparation for victims of violations of human rights. They should raise this question in reviewing the performance of

the States parties and include the issue of reparation in their general comments and recommendations and where appropriate in their judgements and views relating to particular cases.

8. Working groups and rapporteurs who deal with situations and practices involving systematic and gross violations of human rights should make recommendations to Governments on steps to be taken for reparations for victims of gross violations of human rights.

9. It is recommended that in the work of progressive development and codification on the topic of "State responsibility" more attention be given to those aspects of State responsibility that pertain to the obligation of States to respect and to ensure human rights and fundamental freedoms to all persons under their jurisdiction.

10. Legislation authorizing universal jurisdiction over those who commit gross violations of human rights, as well as the establishment of human rights courts, civil or criminal, regional or universal, should be considered as means that could help make those responsible for gross violations accountable for their acts.

Other actors

11. Non-governmental organizations should, where appropriate, insist on the recognition and implementation of the right to reparation for victims of human rights violations, both at the international and national level by, inter alia, exposing violations and assisting victims in pursuing their claims.

12. It is recommended that victims themselves or, where appropriate, the immediate family, dependants or persons acting on their behalf who seek reparations for injuries suffered as a result of human rights violations shall have access to national and international recourse procedures.

13. States seeking and obtaining compensation for gross violations of human rights suffered by their nationals or other persons on whose behalf they are entitled to act shall use these resources for the benefit of the victims. Such States shall not renounce or settle compensation issues without the informed consent of the victims.

14. In all appropriate instances, national and international centres or institutions for the promotion of justice for victims of gross violations of human rights should be established. Such centres or institutions should set up and keep a permanent public record of truth. Furthermore, they should gather and collect information, laws, studies and other materials on relevant national experiences, promote an exchange of experiences and comparisons, distil relevant lessons, and help to build up a store of knowledge.

IX. PROPOSED BASIC PRINCIPLES AND GUIDELINES

137. The Special Rapporteur hereby submits the following proposals concerning reparation to victims of gross violations of human rights.

General Principles

1. Under international law, the violation of any human right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.

2. Every State* has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions.

3. Reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.

4. Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

5. Reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to prosecute and punish perpetrators. Impunity is in conflict with this principle.

6. Reparation may be claimed by the direct victims and, where appropriate, the immediate family, dependants or other persons having a special relationship to the direct victims.

7. In addition to providing reparation to individuals, States shall make adequate provision for groups of victims to bring collective claims and to obtain collective reparation. Special measures should be taken for the purpose of affording opportunities for self-development and advancement to groups who, as a result of human rights violations, were denied such opportunities.

---

* Where these principles refer to States, they also apply, as appropriate to other entities exercising effective power.

Forms of Reparations

8. Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, inter alia, restoration of liberty, citizenship or residence, employment or property.

9. Compensation shall be provided for any economically assessable damage resulting from human rights violations, such as:

(a) Physical or mental harm;

(b) Pain, suffering and emotional distress;

(c) Lost opportunities, including education;

(d) Loss of earnings and earning capacity;

(e) Reasonable medical and other expenses of rehabilitation;

(f) Harm to property or business, including lost profits;

(g) Harm to reputation or dignity;

(h) Reasonable costs and fees of legal or expert assistance to obtain a remedy.

10. Rehabilitation shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims.

11. Satisfaction and guarantees of non-repetition shall be provided, including:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth;

(c) A declaratory judgement in favour of the victim;

(d) Apology, including public acknowledgment of the facts and acceptance of responsibility;

(e) Bringing to justice the persons responsible for the violations;

(f) Commemorations and paying tribute to the victims;

(g) Inclusion of an accurate record of human rights violations in educational curricula and materials;

(h) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting the legal profession and human rights workers;

(v) Providing human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

Procedures and Mechanisms

12. Every State shall maintain prompt and effective disciplinary, administrative, civil and criminal procedures, with universal jurisdiction for human rights violations that constitute crimes under international law.

13. The legal system, especially in civil, administrative and procedural matters, must be adapted so as to ensure that the right to reparation is readily accessible, not unreasonably impaired and takes into account the potential vulnerability of the victims.

14. Every State shall make known, through the media and other appropriate mechanisms, the available procedures for reparations.

15. Statutes of limitations shall not apply in respect to periods during which no effective remedies exist for human rights violations. Claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations.

16. No one may be coerced to waive claims for reparations.

17. Every State shall make readily available all evidence in its possession concerning human rights violations.

18. Administrative or judicial tribunals responsible for affording reparations should take into account that records or other tangible evidence may be limited or unavailable. In the absence of other evidence, reparations should be based on the testimony of victims, family members, medical and mental health professionals.

19. Every State shall protect victims, their relatives and friends, and witnesses from intimidation and reprisals.

20. Decisions relating to reparations for victims of violations of human rights shall be implemented in a diligent and prompt manner. In this respect follow-up, appeal or review procedures should be devised.

Notes

1/ In her study The Battle of Human Rights; Gross, Systematic Violations and the Inter-American System (Nijhoff Publishers, 1988), in Chapter II, Cecilia Medina Quiroga makes a proposal for a definition of the term "gross, systematic violations of human rights". Since the notion "systematic" is not included in the mandate for the present study, the proposed definition by Cecilia Medina is not fully applicable for present purposes. What should, however, be retained from the formula suggested by Cecilia Medina are such elements as the type of rights involved and the character of violations. As regards the type of rights involved, she mentions in particular the rights to life, to personal integrity or to personal liberty.

2/ Report of the International Law Commission on the work of its forty-third session (A/46/10), chapter IV D (text of draft articles and commentaries thereto provisionally adopted by the Commission).

3/ A more elaborate set of minimum humanitarian standards can be found in article 75 of Protocol I to the Geneva Conventions of 12 August 1949, and in the Turku Declaration of Minimum Humanitarian Standards, adopted by a group of experts on 2 December 1990 (reproduced in E/CN.4/Sub.2/1991/55).

4/ General Assembly resolution 40/34 of 29 November 1985.

5/ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, article 15, paragraph 2 (fair compensation).

6/ Ibid., article 16, paragraphs 4 and 5 (full compensation).

7/ E/CN.4/Sub.2/1992/28, part III, draft operative paragraph 17.

8/ A/CONF.151/26 (vol. I), chapter 1, resolution 1, annex I.

9/ E/1712, paragraphs 77-79.

10/ Letter dated 30 July 1951 in E/2087, annex H.

11/ General Assembly resolutions 35/71 of 5 December 1980, 36/188 of 17 December 1981, 37/215 of 20 December 1982, 38/162 of 19 December 1983, 39/167 of 17 December 1984 and 40/197 of 17 December 1985.

12/ Security Council resolution 687 (1991), paragraphs 16 and 18.

13/ HRI/GEN/1, part II, General Comment 4, paragraph 17.

14/ E/CN.4/Sub.2/1992/34, section VII, General recommendation.

15/ E/CN.4/Sub.2/1992/SR.27, paragraph 46 (Mrs. Mbonu) and E/CN.4/Sub.2/1992/SR.31, paragraphs 1-2 (Mrs. Ksentini).

16/ E/CN.4/1334, paragraphs 52-54.

17/ E/CN.4/Sub.2/1989/8 and Add.1.

18/ E/CN.4/Sub.2/AC.2/1993/9.

19/ See articles 50 and 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; articles 51 and 52 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; articles 130 and 131 of the Geneva Convention relative to the Treatment of Prisoners of War; and articles 147 and 148 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

20/ Draft articles on State responsibility, part 1, article 3, Yearbook of the International Law Commission 1980, vol. II (Part Two) pp. 30-34.

21/ Ibid., part 1, article 19, in particular paragraph 3 (c).

22/ According to the (Third) Restatement of the Foreign Relations Law of the United States of 1987, a State violates customary international law of human rights if, as a matter of State policy, it practises, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment of punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights (§ 702).

23/ While not all human rights norms form part of ius cogens, those listed in clauses (a) to (f) in the previous note are generally held to belong to the category of peremptory norms (Restatement of the Law, § 702, comment 12).

24/ See (Third) Restatement of the Law, § 702, Reporters' note 2. See further Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, 1989, pp. 165 ff; Naomi Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law", in California Law Review, vol. 78 (1990), pp. 451-513 (at p. 471). Commentators frequently refer in this context to the Velásquez Rodriguez case, in which the Inter-American Court argued in relation to article 1, paragraph 1, of the American Convention that the obligation "to ensure" implies the duty of states Parties to organize their public protection system in such a manner that "they are capable of juridically ensuring the free and full enjoyment of human rights". (Judgement, Inter-American Court of Human Rights, Series C, No. 4 (1988), para. 166).

25/ See Meron, note 24 at p. 171 and Roht-Arriaza, note 24 at p. 471.

26/ Nigel Rodley, The Treatment of Prisoners under International Law, 1987, p. 97.

27/ Draft articles on State responsibility, part 2, article 5, paragraph 2 (e) (iii), Yearbook of the International Law Commission 1985, vol. II, (Part Two), pp. 24-25.

28/ Commentary on draft articles on State responsibility, Yearbook of the International Law Commission 1985, vol. II (Part Two), paragraph (20), p. 27.

29/ Draft articles on State responsibility, part 2, article 5, paragraph 2 (f), Yearbook of the International Law Commission 1985, vol. II (Part Two), pp. 24-25.

30/ Draft articles on State responsibility, Part 2, article 5, paragraph 3.

31/ Austria v. Italy, Application No. 788/60, Yearbook of the European Convention on Human Rights 1961, (Nyjhoff, The Hague, 1962) p. 116 ff. (at p. 140).

32/ Case concerning the Barcelona Traction Light and Power Company, Ltd. (Second Phase, Belgium v. Spain), ICJ Reports 1970, p. 32.

33/ See also Meron, note 24 at p. 191 and Menno T. Kamminga, Inter-State Accountability for Violations of Human Rights, 1992, pp. 156 ff.

34/ The Effect of Reservations of the Entry into Force of the American Convention, Inter-American Court, Advisory Opinion OC-2/82 of 24 September 1982, Inter-American Court of Human Rights, Series A, Judgments and Opinions, No. 2, paragraph 29. See also Alejandro Artucio, "Impunity of perpetrators", in Report of the Maastricht Seminar, at p. 190.

35/ See (Third) Restatement of the Law, § 901 (Redress for Breach of International Law).

36/ Report of the International Law Commission on the work of its forty-fourth session (A/47/10), paragraph 12.

37/ See A/CN.4/L.472.

38/ Judgement, Inter-American Court of Human Rights, Series C, No. 4 (1988), paragraph 174. See further Juan E. Méndez and José Miguel Vivanco, "Disappearances and the Inter-American Court: reflections on a litigation experience", in Hamline Law Review, vol. 13 (1990), pp. 507-577.

39/ Report of the Human Rights Committee, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), paragraph 609.

40/ Other substantive provisions of the Covenant which were the subject of case laws of considerable interest are, inter alia, the right to engage in political activity (art. 25), equality before the law, the principle of non-discrimination (art. 26) and the right of minorities (art. 27).

41/ Report of the Human Rights Committee, Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. II, annex XI.

42/ Report of the Committee against Torture, Official Records of the General Assembly, Forty-fifth Session, Supplement No. 44, (A/45/44), annex VI.

43/ HRI/GEN/1, Part III, General Recommendation No. 19.

44/ See also section III of the present study, in particular paragraph 41.

45/ Report of the Commission of Inquiry, International Labour Office, Official Bulletin, vol. LXXIV, 1991, Series B, Supplement, paragraphs 471-506.

46/ See further Loic Picard, "Normes internationales du travail et droit à réparation", Report of the Maastricht Seminar, pp. 47-60.

47/ Report of the Commission of Inquiry, para. 576.

48/ Ibid., paragraph 578.

49/ Ibid., paragraph 476.

50/ Ibid., paragraph 496.

51/ Ibid., paragraphs 497-498.

52/ Ibid., paragraph 504.

53/ Ibid., paragraph 616.

54/ Ibid., paragraph 617.

55/ European Court of Human Rights, De Wilde, Ooms and Versijp Cases ("Vagrancy" Cases), judgement of 10 March 1972 (article 50), Series A, vol. 14.

56/ Ibid., paragraph 16.

57/ Ibid., paragraph 20.

58/ Ibid., paragraph 21.

59/ Judgement of 6 November 1980 in the "Guzzardi" Case, Series A, vol. 39, paragraph 114.

60/ See also Jacques Velu and Rusen Ergec, La Convention Européenne des Droits de l'Homme, Bruxelles, 1990, paragraphs 1200-1207; P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights (second edition), Deventer-Boston, 1990, pp. 171-185.

61/ See A.H. Robertson and J.G. Merrills, Human Rights in Europe (third edition), Manchester and New York, 1993, pp. 311-315 (at p. 314).

62/ See Juan E. Mendez and José Miguel Vivanco, "Disappearances and the Inter-American Court: reflections on a litigation experience", in Hamline Law Review, vol. 13 (1990), pp. 507-577.

63/ Judgement, Inter-American Court of Human Rights, Series C. No. 4 (1988).

64/ Judgement, Inter-American Court of Human Rights, Series C. No. 5 (1989).

65/ Judgement, Inter-American Court of Human Rights, Series C. No. 6 (1989).

66/ Judgement, note 63, paragraph 166.

67/ Ibid., paragraph 174.

68/ Judgement, Inter-American Court of Human Rights, Series C. No. 7 (1989).

69/ Velásquez compensation judgement, paragraph 26.

70/ Ibid., paragraph 30.

71/ Ibid., paragraphs 32-39.

72/ Ibid., paragraph 51.

73/ See also Larisa Gabriel, "Victims of gross violations of human rights and fundamental freedoms arising from the illegal invasion and occupation of Kuwait by Iraq", Report of the Maastricht Seminar, pp. 29-39; Frank C. Newman, "Redress for Gulf War Violations of Human Rights", Denver Journal of International Law and Policy, vol. 20 (1992), pp. 213-221; John R. Crook, "The United Nations Compensation Commission - A new structure to enforce State responsibility", American Journal of International Law, vol. 87 (1993), pp. 144-157.

74/ In particular written contributions presented to the Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (Maastricht, 11-15 March 1992), included in the Report of the Maastricht Seminar, SIM Special No. 12 (1992), Editorial Committee: Theo van Boven, Cees Flinterman, Fred Grünfeld, Ingrid Westendorp.

75/ Kurt Schwerin, "German Compensation for Victims of Nazi Persecution", Northwestern University Law Review, vol. 67 (1972), No. 4, pp. 479-527 (at pp. 489-491). Karl Josef Partsch, Report of the Maastricht Seminar, pp. 130-145 (at pp. 133-136).

76/ Schwerin, note 75, p. 496; Partsch, note 75, p. 136.

77/ Schwerin, ibid., p. 497, Partsch, ibid., pp. 136-137.

78/ Schwerin, ibid., p. 499.

79/ Schwerin, ibid., pp. 500-501.

80/ Schwerin, ibid., p. 502.

81/ Schwerin, ibid., p. 506.

82/ Schwerin, ibid., pp. 510-511.

83/ Schwerin, ibid., p. 493.

84/ Schwerin, ibid., p. 519.

85/ "Victims of Crime", working paper prepared by the United Nations Secretariat for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 26 August-6 September 1985) (A/CONF.121/6), paragraph 124.

86/ Anna Michalska, Report of the Maastricht Seminar, pp. 117-124.

87/ Michalska, ibid., pp. 119-121.

88/ Cecilia Medina Quiroga, Report of the Maastricht Seminar, pp. 101-116.

89/ Medina Quiroga, ibid., p. 107.

90/ Medina Quiroga, ibid., p. 115.

91/ Daan Bronkhorst, "Conciliation in the aftermath of political killings", Amnesty International, Dutch Section (1992), 19 pages (at p. 8).

92/ Emilio Mignone, Report of the Maastricht Seminar, pp. 125-129.

93/ Mignone, ibid., pp. 128-129.

94/ Report of the Working Group on Enforced or Involuntary Disappearances to the Commission on Human Rights at its forty-ninth session (E/CN.4/1993/25), paragraph 77.

95/ Edward Khiddu-Makubuya, Report of the Maastricht Seminar, pp. 86-100.

96/ Khiddu-Makubuya, ibid., pp. 94-95.

97/ Khiddu-Makubuya, ibid., pp. 96-98.

98/ Schwerin, op. cit., p. 523.

99/ HRI/GEN/1, part I, General Comment 20 (art. 7), paragraph 15.

100/ See further Robert K. Goldman, "Impunity and international law - Inter-American Commission on Human Rights finds that Uruguay's 1986 amnesty law violated the American Convention on Human Rights", paper (12 pages) presented to International Meeting concerning Impunity, organized by the International Commission of Jurists and the Commission nationale consultative des droits de l'homme, Geneva, November 1992.

101/ Written statement submitted by the International Commission of Jurists to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-fourth session (E/CN.4/Sub.2/1992/NGO/9).

102/ E/CN.4/1993/46, paragraph 688.

103/ José Zalaquett, "The Mathew O. Tobriner Memorial Lecture; Balancing ethical imperatives and political constraints: The dilemma of new democracies confronting past human rights violations", in Hastings Law Journal, vol. 43 (1992), No. 6, pp. 1425-1438 (at p. 1433).

104/ See also Ellen L. Lutz, "After the elections: compensating victims of human rights abuses", in New Directions in Human Rights (ed. Ellen L. Lutz, Hurst Hannum, Kathryn J. Burke), University of Pennsylvania Press, Philadelphia, 1989, pp. 195-212. The author states that "from the former victims' perspective, an open-ended or very long period for filing claims is best" (p. 208).

UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1993/9
9 August 1993

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention
of Discrimination and
Protection of Minorities
Forty-fifth session
Agenda item 4

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Discrimination against HIV-infected people or people with AIDS

Conclusions and recommendations: Final report submitted by Mr. Luis Varela Quirós, Special Rapporteur

DISCRIMINATION AGAINST HIV-INFECTED PEOPLE OR PEOPLE WITH AIDS: CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL RAPPORTEUR OF THE SUB-COMMISSION

1. As has been stated repeatedly in previous reports, discrimination against HIV-infected people is neither admissible under international human rights instruments nor appropriate as a means of implementing the only possible policy for controlling the AIDS pandemic, namely the adoption of preventive measures that can contribute in a rational way to reducing the spread of the disease.

GE.93-14508 (E)

2. Discriminatory practices can be eradicated only by means of national and international education programmes that create a genuine climate of respect for human rights and reject any discriminatory policy against socially vulnerable groups. The dissemination of accurate and appropriate information will help to stamp out certain social prejudices that tend to simplify the issue, reducing it to a matter of the alleged vulnerability of particular groups. This attitude is misleading and dangerous for society itself. Such prejudices serve only to impede the implementation of a general policy of AIDS control involving the whole of society and to create confusion in peoples' minds as to the true causes of the disease.

3. Although in the international legislation in force there are a sufficient number of rules that proclaim and regulate the population's right to health, programmes must be implemented by all governments in order to ensure the effective observance of this right for everyone, give helpful advice on means of preventing the spread of the AIDS virus and provide proper care for victims so that they can face up to the consequences of the disease in a dignified manner. It is necessary for appropriate hospital treatment and psychological care to be provided so that those suffering from the disease can face up to its consequences not only as regards the breakdown of their immune system but also in terms of their mental health and the consequences for their family and close friends who are sometimes discriminated against in the same way as AIDS sufferers.

4. As the AIDS pandemic advances, two groups stand out as being the ones most unfairly affected by it, owing in most cases to discriminatory patterns of behaviour based on ancestral cultural practices. These two groups are essentially women and children.

5. In most societies women continue to be subjected to indiscriminate violence, particularly of a sexual character, which exposes them to the risk of contracting the disease as a result of dangerous behaviour patterns and practices on the part of their husbands or partners. The latter, without taking the necessary precautions, engage in promiscuous behaviour that turns them into potential transmitters of the disease to completely innocent people who, for cultural reasons, are not supplied with the information needed for them to be able to protect themselves. Society should give special attention to this phenomenon so as to ensure women of the full enjoyment of their rights and particularly the right to health, not just in theory but in practice.

6. The incidence of AIDS in the heterosexual population is steadily increasing, as is shown by figures from the World Health Organization, largely as a result of sexual relations without the necessary precautions and irresponsible sexual behaviour, of which women in particular are the victims. If for no other reason, governments should encourage young people and adults alike to adopt every possible measure that they consider effective to prevent the disease. No reason can outweigh in importance the health and, ultimately, the lives of human beings.

7. Special emphasis should be laid on the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, to which 120 States are already party and which requires of them that they seek by all

appropriate means and without delay to eliminate all forms of discrimination against women, particularly in the matter of health services.

8. The Special Rapporteur is deeply concerned by reports from various parts of the world concerning the exploitation of children and the scandalous increase in child prostitution. A number of non-governmental organizations have been constantly denouncing this despicable practice for several years and especially on the occasion of the recent World Conference on Human Rights, held in Vienna last June.

9. It is particularly painful to think that the rights of one section of the population are being violated when indeed the international obligations of most States, and the policy of all of them, require that due attention be given to children, as a group who cannot by themselves defend their rights through being under the legal protection of their elders. The consequences that this phenomenon may have for the mental and physical development of the persons affected by this practice are truly alarming.

10. No one can deny that the United Nations system has special responsibility for protecting children. Occurrences like the spread of various sexually-transmitted diseases and particularly AIDS, which are barely the tip of the iceberg, tend to ruin the physical and mental development of children and to sap their confidence in society and in the international community as a whole. There must be an end to this practice which is not far short of slavery and which turns boys and girls alike into cheap merchandise for procurers, sometimes with the complicity of their own parents or guardians. Not only must such a practice be condemned, but also governments should take strict measures to put an end to this inhuman exploitation of children all over the world.

11. The international community for its part must take effective measures to put an end to this abusive, discriminatory and loathsome practice against the most innocent members of any society. This practice must be strongly and clearly condemned by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the earliest opportunity, if possible at the present session.

12. Aside from the foregoing matters, the Special Rapporteur is firmly convinced that the United Nations should not practise any kind of political discrimination against officials of the Organization affected by the AIDS virus or any other terminal disease. All United Nations bodies and agencies should be given instructions to this effect so that they make every effort to avoid discriminatory practices that run counter to the recommendations made by the World Health Organization and the bodies responsible for the protection and promotion of human rights. Were the United Nations to act otherwise, it would forfeit the legitimacy it has achieved since its inception in the fight against discrimination and would violate its own Charter.

13. If humankind does not in the near future take measures to halt the rapid advance of AIDS the very survival of the human species will be jeopardized. It is high time that humankind became aware of the danger lying in store before it is too late, and in this struggle discrimination, disinformation and prejudice are the allies of death as represented by AIDS. Only education,

fair and equitable treatment for all members of society and a practice directed towards the preservation of human life over any other value will be effective allies in the human race's struggle for its own existence.

14. Any human being suffering from a disease, contagious or otherwise, should be treated without discrimination in accordance with the universal principles applicable in the field of human rights.